

## 1 INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE

## 2 HEARINGS

6 Washington, D.C.

7 May 17, 1999

13 This document constitutes accurate minutes of the  
14 hearings held May 17, 1999, by the International  
15 Competition Policy Advisory Committee. It has been  
16 edited for transcription errors.

18 -----  
19 James F. Rill

Paula Stern

20 Co-Chair

Co-Chair

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14               Taken at the American Geophysical Union, 2000 Florida Avenue,  
15 N.W., First Floor Conference Center, Washington, D.C., beginning at 9:15 A.M.,  
16 before Bryan Wayne, a court reporter and notary public in and for the District of  
17 Columbia.

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1 APPEARANCES:

2 Advisory Committee Members:

3 James F. Rill, Co-Chair and Senior Partner, Collier, Shannon, Rill & Scott,

4 PLLC

5 Paula Stern, Co-Chair and President, The Stern Group, Inc.

6 Merit E. Janow, Executive Director and Professor in the Practice of

7 International Trade, School of International and Public Affairs, Columbia

8 University

9 Thomas E. Donilon, Partner, O'Melveny & Myers

10 John T. Dunlop, Lamont University Professor, Emeritus, Harvard

11 University

12 Department of Justice Employees:

13 The Honorable Janet Reno, Attorney General of the United States

14 Joel I. Klein, Assistant Attorney General, Antitrust Division

15 Members of the Public Who Made an Appearance and Presented Written or Oral

16 Statements:

17 Panelists: Members of the ABA Section of Antitrust Law ICPAC Task Force

18 Phillip A. Proger, Jones, Day, Reavis & Pogue; Chair, ABA Section of

19 Antitrust Law

20 Harvey M. Applebaum, Covington & Burling; Co-Chair, ABA Section of

21 Antitrust Law ICPAC Task Force

22 A. Paul Victor, Weil, Gotshal & Manges LLP; Co-Chair, ABA Section of

23 Antitrust Law ICPAC Task Force

1 Panelists: Members of the ABA Section of Antitrust Law ICPAC Task Force

2 (Continued)

3 Margaret E. Guerin-Calvert, Economists Incorporated

4 Joseph F. Winterscheid, Jones, Day, Reavis & Pogue

5 Janet L. McDavid, Hogan & Hartson LLP

6 Panelists: Economists

7 Simon J. Evenett, The Brookings Institution; Department of Economics,

8 Rutgers University

9 David J. Salant, Law and Economics Consulting Group

10 Leonard Waverman, Law and Economics Consulting Group

11 Andrew R. Wechsler, Analytic Studies International, Inc.

12 Panelists: Representatives of U.S. Businesses

13 Eastman Kodak Company - Christopher A. Padilla, Director, International

14 Trade Relations

15 Guardian Industries Corp. - Stephen P. Farrar, Director, International Business

16 United Parcel Service - Larry Stevenson, Vice President, International

17 Industrial Engineering; Andrew R. Wechsler, Director of International

18 Economic Strategy and Analysis, Analytic Studies International, Inc.; and

19 Raymond Calamaro, Hogan & Hartson LLP

20 Panelists: Institution Building and Competition Law Advocacy

21 Richard Gordon, International Monetary Fund

22 R. Shyam Khemani, The World Bank

23 Emmy Simmons, U.S. Agency for International Development

1 IN ATTENDANCE:

2 Advisory Committee Staff:

3 Cynthia R. Lewis, Counsel

4 Andrew J. Shapiro, Counsel

5 Stephanie G. Victor, Counsel

6 Eric J. Weiner, Paralegal

7 Estimated Number of Members of the Public in Attendance: 19

8 Reports or Other Documents Received, Issued, or Approved by the Advisory

9 Committee:

10 American Bar Association Section of Antitrust Law: "Report on the Use of

11 Private Litigation to Challenge Private Anticompetitive Conduct

12 Affecting U.S. Foreign Commerce"

13 American Bar Association Section of Antitrust Law: "Report on

14 Multijurisdictional Merger Review Issues"

15 The Brookings Institution: "Strengthening Trans-Atlantic Antitrust

16 Cooperation," A project jointly sponsored by The Brookings Institution

17 and the Royal Institute of International Affairs - Case Studies - Compiled

18 by Simon J. Evenett, The Brookings Institution, Rutgers University and

19 CEPR

20 Law and Economics Consulting Group (LECG): "Standards Wars - News

21 From the Front Lines and International Solutions," presentation by David

22 Salant, Leonard Waverman, and Andrew R. Wechsler Law and Economics

23 Consulting Group (LECG): "Standards WARS: The Use of Standard

1       Setting as a Means of Facilitating Cartels; Third Generation Wireless  
2       Telecommunications Standard Setting” by Peter Grindley, David J. Salant,  
3       and Leonard Waverman  
4   Guardian Industries Corp.: “Barriers to Entry Into the Japanese Flat Glass  
5       Market: Opportunities for Bilateral Cooperation”  
6   United Parcel Service: Statement of Larry Stevenson, Vice President of  
7       International Industrial Engineering, United Parcel Service attaching “The  
8       Entry into Unregulated Markets by State Owned Enterprises and  
9       Regulated Monopolies; A Serious Threat to International Competition?”  
10      by Andrew R. Wechsler, Analytic Studies International, Inc. and  
11      statement by James P. Kelly, Chairman and CEO, UPS (1/29/99), among  
12      other attachments  
13   U.S. Agency for International Development: “USAID and Competition Law  
14      Advocacy and Institution Building,” presented by Emmy B. Simmons,  
15      Deputy Assistant Administrator, Center for Economic Growth and  
16      Agricultural Development, Global Bureau, U.S. Agency for International  
17      Development  
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## P R O C E E D I N G S

(9:15 a.m.)

DR. STERN: Good morning. I'd like to call to order our hearings for May 17th. It is a pleasure to welcome you all to, actually, the second day of our International Competition Policy Advisory Committee Spring hearings. We are particularly honored this morning that the Attorney General of the United States, Janet Reno, joins us with the Assistant Attorney General of the United States for Antitrust, Joel Klein, to make some opening remarks.

First, let me say very briefly, the International Competition Policy Advisory Committee was established by the Attorney General and the Assistant Attorney General for Antitrust back in the Fall of '97 to provide guidance to the Department of Justice on the topics of multijurisdictional mergers, the interface of trade and antitrust policies, and cooperation between the U.S. and foreign authorities in antitrust enforcement, particularly enforcement prosecutions against international cartels.

Jim will certainly speak for himself, but I certainly wish to say that my appointment to co-chair this initiative with Jim is a great personal privilege and a great honor.

I wish now to introduce the Attorney General. Bearing in mind that every day you have a schedule packed to accommodate the immediate and the important, your attendance this morning underlines the importance of this Committee's work, and we very much appreciate it. I'd like to invite you now to share any remarks you wish to make, followed by Joel Klein.

1                   ATTORNEY GENERAL RENO: I thank you so much, Dr. Stern,  
2 and to you and Jim, I say a very special thank you, and to Merit Janow, for all  
3 that you have done.

4                   When one comes to Washington for the first time and you don't  
5 know too many people and you're suddenly Attorney General of the United  
6 States, you remember those people that you rely on in those early days. And Jim  
7 Rill was one of those people who made a point of being there in a bipartisan way,  
8 and I think it was in a great tradition of public service.

9                   Your, Paula, willingness to do this is a further example, and I'm  
10 just deeply deeply grateful.

11                  MR. RILL: Thank you, General.

12                  ATTORNEY GENERAL RENO: To the members of the  
13 Committee, thank you so much. I know the time that something like this takes  
14 and I am deeply grateful for your willingness to do it because I think it is  
15 profoundly important. I think sometimes we get blinders on and for ICPAC to  
16 spend the time to hear from people is so very important.

17                  To all of those who are willing to come and give of their time, their  
18 wisdom, their advice, their thoughts, I say thank you. I think it is again very  
19 important that government be informed.

20                  I think one of the first points that Anne Bingaman and Jim made to  
21 me, and then Joel has made it again and again and again, is that international  
22 competition policy is playing an increasingly important role in the global  
23 economy. I'm called to the White House to talk about things that relate to this

1 issue more often in the last six years as each year goes by. And so I think it's  
2 vital.

3 I look at the perspective of the Justice Department and, Tom, you  
4 will appreciate this. I think all crime is becoming global. Antitrust issues are  
5 becoming global. And as Strobe Talbott told me, he said: We're going to have to  
6 start developing a working relationship such as the State Department and the  
7 Defense Department have long had, out of necessity. We're going to have to do  
8 the same thing with the Justice Department.

9 You realize, whether it be criminal prosecution, cyber crime,  
10 antitrust issues, it is going to be so important that we inform ourselves in a  
11 global way about the antitrust implications of all that we do. So I'm particularly  
12 glad that we have a former State Department perspective.

13 We're committed to meeting the challenges posed by the new  
14 global economy, and Joel, I think, has done just a wonderful job. He has advised  
15 me on so many different issues and you haven't been wrong once yet. And I just  
16 want to personally thank you for your willingness to lead this Division, and I  
17 think you've done a wonderful job.

18 Through its sustained enforcement efforts, the Antitrust Division  
19 has succeeded in exposing international cartels. The result has been numerous  
20 guilty pleas and in the last two fiscal years record fines. Just two weeks ago,  
21 SGL AG, the world's largest producer of graphite and carbon products, agreed to  
22 pay a record fine of \$135 million and pled guilty to participating in an  
23 international conspiracy to fix prices and to allocate the volume of graphite

1 electrodes in the U.S. and elsewhere.

2               With numerous grand juries currently investigating suspected  
3 international cartel activity, the unmasking and prosecution of international  
4 cartels is likely to increase dramatically.

5               Another area where the Justice Department has met challenges  
6 posed by globalization is in its review of multinational mergers. The global  
7 economy is currently undergoing an unprecedented merger wave. Many of these  
8 transactions require review by several different national antitrust enforcement  
9 agencies. The Antitrust Division I think has managed this flood of multinational  
10 merger notifications with great skill and it has assured that the interests of U.S.  
11 consumers are protected.

12              While the Department has enjoyed important successes in its  
13 international antitrust enforcement efforts, the increasing globalization of  
14 markets presents unique challenges to the development of sound competition  
15 policy. That's the reason that Joel and I agreed that the Department could benefit  
16 greatly from bringing together a diverse group of experts for two years to make  
17 recommendations concerning the really critical issues that we face in  
18 international competition policy. Again, I am just so deeply grateful that we  
19 were able to attract such great people and those that can provide such a variety of  
20 perspectives.

21              Paula has described the issues that we're confronting: first,  
22 building on U.S. antitrust cooperation agreements, how do we build a consensus  
23 among governments for cooperation in effective enforcement efforts aimed at

1 eliminating international cartels? This is vital to me because I have seen so  
2 much progress made on a number of fronts in terms of international law  
3 enforcement policy generally.

4           We're trying to develop a system of working relationships with  
5 other nations so that there will be no safe place to hide, so that we can ensure the  
6 extradition of nationals, so we can focus on domestic prosecutions if extradition  
7 does not succeed. But again I see in that situation an occasion where we take  
8 three steps forward and four steps back sometimes as governments change and as  
9 policies change. So your thoughts on this effort will be very important.

10           Second, given the proliferation of national antitrust laws and  
11 premerger notification requirements, how can the various antitrust agencies  
12 achieve sound results for both merging firms and consumers?

13           And third, how should the U.S. address anticompetitive schemes by  
14 private firms in other countries that impede access to markets?

15           From what I've heard, the Advisory Committee has made  
16 impressive progress toward its goal of delivering a report to the Justice  
17 Department by the end of this year. Just a few weeks ago, the Advisory  
18 Committee, as I understand it, held the first day of its Spring hearings with  
19 testimony from members of prominent trade associations, bar associations and  
20 other experts. This testimony I think is going to be very vital in developing  
21 recommendations and reports for the Department.

22           I have long felt that public service is one of the great callings that  
23 anyone can undertake. When you've done public service and then you go out into

1 the private sector and are still willing to come back and lend the wisdom of your  
2 vantage point of both public and private experience, I think it is so important and  
3 am deeply grateful.

4               So people have been thanking me for being here this morning. I  
5 just thank you so many times over for your willingness to do this.

6               DR. STERN: Thank you so much.

7               MR. RILL: Thank you, General.

8               DR. STERN: Joel.

9               MR. KLEIN: First let me say to you, Madam Attorney General,  
10 without your leadership and support this Advisory Committee would not have  
11 been possible, and without your continuing strong support for effective antitrust  
12 enforcement the Division could not be doing the important work that it is doing  
13 today in the global economy. So we all owe you a great debt of gratitude and  
14 most particularly, frankly, America's consumers, who I think benefit from the  
15 work that the Division does.

16              I join with you in saluting Paula and Jim, two stalwarts in the field  
17 who have been enormous support and help to me, and Merit, who has led the  
18 work of this Committee with great sensitivity and effectiveness.

19              I would just be very brief in saying a couple of points. This world-  
20 wide web, this State Department-like view of the Justice Department's role in the  
21 global economy, is actually continuing to develop with remarkable, remarkable  
22 success, even as the Committee does its work.

23              We have no choice in doing that because our outreach in

1 international cartel cooperation, our necessity to review on a daily basis  
2 multinational mergers that are being reviewed by other countries, and our issues  
3 at the interface of trade and competition policy, whether it's the kind of positive  
4 comity referral we had with DG-IV, is forcing us to work on an increasing basis  
5 in a global way with our counterparts.

6 I am pleased to say that we have some of the best possible working  
7 relationships with our colleagues in Europe at DG-IV, with our colleagues in  
8 Canada, with our colleagues in Australia. And we are looking to expand and  
9 recently the President and the Japanese Prime Minister announced what will soon  
10 become a formal agreement with the Japanese, hoping to bring them into the  
11 family of effective cooperation in international antitrust enforcement.

12 So in an ironic kind of way, we are developing a bilateral lattice of  
13 interrelationships which I think will effectively develop into really a multilateral  
14 system of multinational antitrust enforcement.

15 The issues before this Committee could not be more timely or more  
16 important. We are heading into a round at the end of this year with respect to the  
17 World Trade Organization where the issues of trade and competition policy will  
18 be before us.

19 Every day that I wake up, I read in the newspaper about a new  
20 merger that I know we and somebody else somewhere in the world or many other  
21 places in the world is going to review. And just last week the Senate Antitrust  
22 Subcommittee held hearings on trade and competition policy issues, and you'll  
23 hear from some of the same people with some of the same concerns later today.

1           Last week at the OECD, the Antitrust Division put on a key  
2 presentation with respect to international cartel enforcement which I think was  
3 really an eye opener for many of the members of the OECD organization and I  
4 suspect will have significant implications for long-term antitrust cooperation.

5           I along with Karel Van Miert and many industry leaders were in  
6 Berlin last week to discuss the set of issues involved in international antitrust  
7 enforcement and multijurisdictional merger review. We heard from Jürgen  
8 Schrempp of DaimlerChrysler, who went through the process in ten different  
9 antitrust authorities when the Daimler-Chrysler merger was put forward.

10           Again, what you could see there was a growing consensus,  
11 including I think even the Germans, a consensus with respect to a sensible WTO  
12 policy, one that would aim toward developing a culture of competition not only  
13 within the WTO but worldwide, and one that would move away from dangerous  
14 efforts such as premature dispute resolution.

15           Both Alex Schaub of DG-IV and Konrad von Finckenstein of  
16 Canada supported notions along those lines which I found personally very  
17 encouraging.

18           Just this past Friday I was at the Mentor Group for a four-hour  
19 session, which is a group that sponsors key EU-U.S. conferences, a four-hour  
20 session on these very issues.

21           So what I want to say is, enough preliminary remarks. There's a lot  
22 of work ahead for this Committee. I can see from the talent assembled here at  
23 this table, some of the leading thinkers in our field, that you are going to have a

1 robust, exciting, and I suspect, highly informative meeting today.

2 I want to thank all of you for the effort and we are very eager to see  
3 your report later this year.

4 ATTORNEY GENERAL RENO: And if anybody has any questions  
5 or suggestions for us at this point, we're certainly receptive to them.

6 DR. STERN: Hearing none, with respect to you and your busy  
7 schedule --

8 ATTORNEY GENERAL RENO: Thank you.

9 (Pause.)

10 DR. STERN: Okay, well, let's resume the hearing. I'll have to give  
11 Joel my quip separately, because when he talked about this lattice that he was  
12 making I kept thinking that good fences make good neighbors. In this case I  
13 guess a good lattice may make good trading partners.

14 Our hearings, as I said, are a continuation of the April 22nd  
15 hearing, and together these Spring hearings complement those that were  
16 conducted by the Advisory Committee last November.

17 Today's format is as follows: It's designed to allow members of the  
18 Advisory Committee to hear from associations and individuals who have been  
19 developing input for the Advisory Committee for many months. We've heard  
20 from individual U.S. businesses, economists, attorneys and others engaged in  
21 technical assistance to develop antitrust regulations around the world. These  
22 hearings provide us an opportunity to hear from participants who will share with  
23 the Committee their views and experience on matters relating, as I said very

1 briefly, to multijurisdictional merger reviews, the interface of trade and  
2 competition policy, and thirdly the cooperation between antitrust enforcement  
3 authorities.

4           Last November the Advisory Committee held hearings featuring  
5 roundtable discussions with the heads of 10 foreign competition authorities as  
6 well as distinguished lawyers, economists, academics and other experts. And the  
7 transcripts of those hearings as well as the full meetings of the Advisory  
8 Committee are posted now on the Advisory Committee's website, along with a  
9 host of other useful materials relating to this Committee's work. I will save you  
10 all of the letters of the website address -- it's a mouthful -- but the staff can  
11 certainly provide you with that.

12           Let me take a few minutes to discuss the substance of today's  
13 hearing. The Advisory Committee will hear presentations by the ABA Section of  
14 Antitrust Law's task force that was established to provide input to our Advisory  
15 Committee. We shall hear from its members about the ABA Antitrust Section's  
16 views on two basic topics: first, multijurisdictional mergers and joint ventures;  
17 and secondly, the use of private litigation to challenge private anticompetitive  
18 conduct affecting U.S. foreign commerce. Again, I want to thank all of you for  
19 your continued dedication, for coming, and for providing us -- as the year  
20 stretches to two years -- with your expertise.

21           After a break for lunch, we then have scheduled three more  
22 sessions. The first afternoon session is a presentation by economists, again on  
23 two distinct topics. First we'll hear a presentation about a Brookings Institution

1 study that's underway on trans-Atlantic antitrust cooperation. And then we'll  
2 have an opportunity to hear about the use of standard-setting as a means of  
3 facilitating cartels and market blockage, and its potential trade effects,  
4 particularly in high-tech industries.

5               At the next afternoon session, the Advisory Committee will hear  
6 presentation from the representatives of three U.S. businesses: Eastman Kodak,  
7 Guardian Industries and the United Parcel Service -- UPS -- about the experience  
8 of these businesses in their overseas markets.

9               We will conclude with presentations on institution-building and  
10 competition law advocacy. And our panelists in that concluding session have  
11 broad experience, representing the U.S. Agency for International Development,  
12 the World Bank, and the International Monetary Fund. They will share with us  
13 their experience with technical assistance programs of their respective  
14 organizations in competition law and policy.

15              We welcome everyone's attendance in the audience. We appreciate  
16 your interest in our Committee and its work. I'd like just to note that the  
17 audience should please refrain from giving us their views at this particular  
18 moment during the day -- our format does not accommodate that kind of input --  
19 but we do welcome and indeed invite any reactions that you may have to today's  
20 meeting in writing. You may contact one of the staff people who are arrayed here  
21 if you wish to submit written comments to the Advisory Committee.

22              I think that we should further bless this Committee by saying that  
23 this meeting is being held in accordance with the Federal Register notice.

1                   I would now like to say that we are eager to hear from the other  
2 participants who have prepared their remarks. But before doing so, I'd like to  
3 turn to my esteemed colleague, Co-Chair Jim Rill, for any remarks he might wish  
4 to make.

5                   MR. RILL: Thank you, Paula. I think you have with great  
6 articulateness described the format of the day and the purpose for which we are  
7 here.

8                   I simply want to add my thanks to all of the panelists who are going  
9 to appear today for the very hard work that they've done. And the value it's going  
10 to have to our deliberations is, I'm sure, extraordinarily substantial. Having said  
11 that, I don't want to take up any more of your time.

12                  DR. STERN: Okay. Well, I think the group has decided to adjust  
13 their format so that we'll hear presentations on both issues and then we'll open it  
14 up to questions.

15                  Phil, are you going to lead off?

16                  MR. PROGER: Yes, I am.

17                  DR. STERN: I could somehow tell by that eager smile.

18                  MR. PROGER: Good morning and thank you for having us. While  
19 many of us have appeared before you in our individual capacity, I am pleased that  
20 we can appear today representing the Section of Antitrust Law of the American  
21 Bar Association. The views expressed today in the two papers that we are  
22 transmitting, while not formal views of the American Bar Association, are formal  
23 views of the Section of Antitrust Law of the American Bar Association.

1 I'd like to introduce my co-panelists. To my far right is Jan  
2 McDavid, the Chair Elect of the Section and who already has testified in an  
3 individual capacity. Next to Jan is one of our two Co-Chairs of our Task Force  
4 on ICPAC, Paul Victor. Paul is a past Vice Chair of the Section and extremely  
5 active in the area of international antitrust. To my immediate right, Harvey  
6 Applebaum, past Chair of the Section and Co-Chair of our ICPAC Task Force.  
7 Harvey brings a wealth of experience and expertise to the Section's deliberations  
8 in this area.

9 And on behalf of the Section, I want to express our thanks to them  
10 in co-chairing our task force and producing these two excellent papers, which  
11 have been approved by our council and gone through the blanket authority  
12 process of the American Bar Association. As such, these two papers formally  
13 represent the views of the Section of Antitrust Law.

14 Across my way also are Meg Guerin-Calvert and Joe Winterscheid,  
15 members of the ICPAC Task Force who appear today to help respond to any  
16 questions that you might have.

17 The format that we thought we would do was to start with the paper  
18 on Multijurisdictional Mergers and Joint Ventures and then go to the Private  
19 Litigation paper. The way we were going to do it is that Joe is going to introduce  
20 the multijurisdictional mergers and Harvey is going to give a brief overview on  
21 private litigation. And then we'll be open for any questions from the members of  
22 ICPAC.

23 DR. STERN: Great.

1 MR. PROGER: Joe.

2 MR. WINTERSCHEID: Thank you, Phil.

3 I too am pleased to be here today to be able to present the views of  
4 our Working Group on Multijurisdictional Merger Review issues. Our working  
5 group consisted, in addition to myself, of Michael Byowitz, Barry Hawk, and  
6 Spencer Weber Waller, and in their absence I'd like to commend them for the fine  
7 work that they did in helping us to prepare and present the paper.

8 At present there are over 50 jurisdictions, I've heard estimates of  
9 up to 80 jurisdictions, with antitrust merger control laws on the books, up from  
10 only a handful a decade ago. This fact, coupled with the increasing number of  
11 transactions which have some significant international dimension, has resulted in  
12 a dramatic increase in the incidence of multijurisdictional merger reviews by  
13 multiple jurisdictions.

14 The parties to international transactions of any consequence these  
15 days are subjected to a multitude of filing requirements and mandatory waiting  
16 periods around the world. This process imposes significant costs on  
17 transactions, and the Advisory Committee's focus on the issues that this process  
18 raises is of great importance to the business community, the antitrust bar, and the  
19 international enforcement missions of both agencies.

20 I think it's significant that in prior comments submitted by various  
21 trade and industry groups, including the National Association of Manufacturers,  
22 the transaction costs and burdens associated with the multijurisdictional merger  
23 review process were identified as one of the most significant problems facing

1 American business in the area of international antitrust enforcement and antitrust  
2 enforcement generally.

3           The Advisory Committee's earlier working drafts on these issues  
4 set forth a number of possible solutions ranging from substantive convergence of  
5 international antitrust laws to procedural harmonization, including a common  
6 notification form, common time periods, or alternatively, focusing on problems  
7 presented in specific individual jurisdictions.

8           We believe that broad-base initiatives directed at substantive  
9 convergence, formalized allocation of enforcement responsibility, and/or  
10 supranational mediation efforts offer little prospect of success. We therefore  
11 believe that the Advisory Committee's merger review initiative should focus on a  
12 more limited agenda directed at reducing unnecessary transaction costs  
13 associated with the international merger review process, in particular as to those  
14 transactions which do not raise serious competitive issues.

15           In that respect, we believe that there is little prospect for resolving  
16 the significant issues arising in the context of Boeing-McDonnell Douglas or  
17 Daimler Benz-Chrysler, for that matter, where transactions on their face raise  
18 significant substantive issues in various jurisdictions and give various  
19 jurisdictions a legitimate basis for examining the effects of those transactions  
20 within their local territory.

21           On the other hand, we believe that the focus of the Advisory  
22 Committee's efforts and the agency's efforts should be on those transactions  
23 which do not raise serious competitive concerns, in an effort to try to streamline

1 the multijurisdictional review process so as to avoid unnecessary transaction  
2 costs as to those transactions which do not raise any serious enforcement issues  
3 in a growing number of jurisdictions having onerous premerger notification  
4 requirements.

5           The most effective means to reduce unnecessary transaction costs  
6 associated with the multijurisdictional process is to promote the adoption of  
7 clear objective tests for determining when notification is required, to eliminate  
8 notification requirements in those jurisdictions lacking any reasonable basis for  
9 asserting jurisdiction over a transaction, and to limit the information required in  
10 connection with those transactions which lack antitrust significance.

11           The ultimate goal should be to minimize transaction costs and  
12 burdens without reducing the public benefit and without compromising the  
13 ability of any jurisdiction to enforce its own competition laws. The main goal in  
14 addressing multijurisdictional merger review issues therefore should be directed  
15 towards promoting reforms in individual merger control regimes so that they  
16 focus on those transactions that raise competitive concerns within their territory  
17 and do not unduly burden transactions that lack anticompetitive potential.

18           Secondarily, ICPAC should promote limited procedural reforms in  
19 an effort to reduce unnecessary transaction costs associated with the notification  
20 process itself.

21           Towards these ends, we would propose the following specific  
22 agenda items, which are detailed in our paper. First, the agencies should promote  
23 objective jurisdictional tests for premerger notification which incorporate

1 appropriate de minimis local contacts thresholds. Transaction costs associated  
2 with the multijurisdictional merger review process could be substantially reduced  
3 if filing requirements were based on readily-accessible and objectively based  
4 jurisdictional thresholds.

5           In particular, notification thresholds based on market share-based  
6 tests should be eliminated or at a minimum coupled with an appropriate  
7 objectively based de minimis local sales or other local contacts threshold.  
8 Examples of jurisdictions which are problematic in this respect include Belgium  
9 -- the present test is combined worldwide turnover of approximately \$84 million  
10 and a market share in Belgium of more than 25 percent; Brazil, 20 percent market  
11 share; Greece, 25 percent, and so forth. There are a growing number of  
12 jurisdictions in which premerger notification requirements are predicated on  
13 market share-based tests. Parties should not be required to undertake a  
14 full-blown substantive review of a proposed transaction in a multitude of  
15 jurisdictions simply to determine whether premerger notification is required.

16           The agencies should promote elimination of these market share-  
17 based tests in favor of objectively quantifiable and readily accessible  
18 information such as sales or turnover in the affected jurisdiction. Appropriate  
19 models are provided not just in the United States, but significantly by a number  
20 of other jurisdictions in the international community, including Canada, the  
21 Netherlands, Switzerland, and the European Union.

22           Notification thresholds should also incorporate an appropriate and  
23 objectively-based de minimis standard as to the level of local contacts required

1 to trigger premerger notification, especially as to foreign-to-foreign transactions.

2 That is, transactions involving firms which do not have actual business

3 operations within the territorial confines of the particular jurisdiction involved.

4 Requiring premerger notification on the basis of worldwide assets

5 or sales, especially at the exceedingly low levels which characterize many of

6 these regimes, as to transactions that lack any significant local nexus increase

7 transaction costs without any corresponding enforcement benefit. Notification

8 should not be required in any jurisdiction based merely on potential local

9 “effects,” broadly defined, or local business activity unless such effects or

10 activity exceed some de minimis standard as measured either by reference to the

11 target's local sales activity and/or an appropriate minimal level of contacts by

12 both parties to the transaction.

13 Once again, suitable models in this regard include Canada, which

14 incorporates a target company business operations in Canada coupled with

15 combined Canadian assets and sales; the Netherlands, combined worldwide

16 turnover plus the parties' individual Dutch turnover; and the Hart-Scott-Rodino

17 Act, in particular the foreign transaction exemptions provided for in the rules.

18 Second, the agencies should promote harmonization of initial

19 premerger review periods and harmonization of rules pertaining to **when**

20 premerger filings can or must be made. Achieving harmonization of review

21 periods in cases which raise serious competitive issues once again we believe is

22 an unrealistic objective, at least in the short run. With respect to timing issues

23 associated with the merger review process, we therefore believe that the agencies

1 should focus on the disparate **initial** review periods, and again in particular as to  
2 those transactions lacking any significant anticompetitive potential.

3           In most jurisdictions the initial review period is in the one-month  
4 time frame, as, for example, the Hart-Scott-Rodino-Act, EU merger control  
5 regulation, Germany, and Canada, which is being extended to 14 days on the  
6 short form and 42 days on the long form filing. Marginal differences in the  
7 review period are inconsequential since they can be managed from a transaction  
8 planning standpoint. There are, however, a number of “outlier” jurisdictions as  
9 to which the timing requirements do impose significant transaction costs and  
10 these should be the focus of continued discussions and efforts. These would  
11 include the Czech Republic, with an indefinite review period; Greece, a three-  
12 month initial period; Hungary, 90 days; Brazil, up to 72 days. Jurisdictions such  
13 as these, which have either open-ended or very extended initial review periods,  
14 are where the greatest efforts should be directed.

15           The agencies should also promote harmonization of rules  
16 pertaining to **when** parties are permitted to file. Under the Hart-Scott-Rodino  
17 process, of course, parties are permitted to file as soon as a letter of intent,  
18 agreement in principle or contract has been executed. Many other jurisdictions  
19 also follow this example, most notably Germany and Canada.

20           In many jurisdictions, however, including the European Union and  
21 most jurisdictions following the basic EU-format on premerger notification,  
22 including Belgium, many other European Union jurisdictions, as well as Eastern  
23 European jurisdictions, premerger notification is not permitted until the parties

1 have actually executed a definitive agreement.

2           This definitive agreement requirement is unnecessary and impedes  
3 the parties from orchestrating the multijurisdictional filing process in the most  
4 efficient manner. The difficulties associated with the definitive agreement  
5 requirement are exacerbated by the fact that, although the parties **cannot** file  
6 prior to the execution of the definitive agreement, they **must** file in many of  
7 these jurisdictions within a short time frame following the execution. This is the  
8 case, for example, under the EU Merger Regulation, one week; Belgium, likewise  
9 one week; Finland, one week; Greece, 10 days; and Brazil, 15 days.

10           It is virtually impossible to prepare the required detailed  
11 submissions within these specified timeframes and, to the extent that the parties  
12 are required to observe mandatory waiting periods after filing, these filing  
13 deadlines are entirely superfluous. As a consequence, we believe that the  
14 agencies should advocate the elimination of the definitive agreement requirement  
15 and these compressed post-execution filing deadlines. This would permit the  
16 parties to proceed more efficiently in orchestrating their multijurisdictional  
17 filing requirements and it would also, we believe, promote de facto  
18 harmonization of the initial review periods themselves, as well as perhaps  
19 promoting voluntary confidentiality waivers, since the review of transactions in  
20 various jurisdictions would be undertaken within the same basic time parameters.

21           Third, the agencies should promote the elimination of unnecessary  
22 burdens imposed by premerger notification systems, in particular as to the initial  
23 filing requirements. Filing requirements and the information required should be

1 tailored so as to avoid imposing unnecessary transaction costs that do not have a  
2 direct correlation to effective competition law enforcement in the affected  
3 jurisdiction. The minimum amount of information needed to make that  
4 determination should be all that is required and to the extent possible that  
5 information should be limited to information maintained by the parties in the  
6 ordinary course of business.

7           In this connection, it is often observed that in jurisdictions  
8 imposing a burdensome initial filing requirement, the European Union being one  
9 example, the system seems to work well because the agencies are willing to cut  
10 back on those requirements in the context of premerger notification meetings.  
11 While this is workable in connection with a single or limited number of  
12 jurisdictions, in our experience it is very difficult and sometimes unworkable  
13 when you're dealing with 12, 15 or 20 individual jurisdictions. Also, success in  
14 achieving these more reasonable requirements is somewhat limited in connection  
15 with those jurisdictions lacking significant substantive expertise in the merger  
16 review process in determining what information they actually need.

17           Finally, I would like to offer a few comments in connection with  
18 observations relating to transparency. It has been observed, for example, that the  
19 overall merger review process could be improved by greater transparency within  
20 particular jurisdictions, including the U.S. For example, it has been proposed  
21 that the reviewing agencies should be required to provide greater detail in their  
22 explanations as to why action has **not** been taken in addition to articulating the  
23 reasons why a particular transaction has been challenged.

1                   While this suggestion has merit in the abstract, it should be  
2 recognized that it may also have a negative correlation with the burdens imposed  
3 on the parties in the notification process itself. In our experience, those agencies  
4 which have been less inclined to acquiesce in more limited disclosure and  
5 information requirements are those jurisdictions which have a “reasoned  
6 decision” requirement at the back end. In other words, they need the information  
7 very often not necessarily to assess the merits of the transaction, but rather  
8 simply to assist them in drafting and publishing their reasoned decision. So  
9 while “transparency” is an objective in the abstract to be promoted, it should be  
10 recognized that there are countervailing considerations which need to be taken  
11 into account.

12                   Nevertheless, we believe that the agencies should promote greater  
13 clarity and transparency in the multijurisdictional merger review process itself,  
14 particularly as it relates to international cooperative enforcement initiatives.  
15 Antitrust enforcers here and abroad have frequently touted the benefits of  
16 information sharing and cooperation with their foreign counterparts, and in that  
17 context they have promoted the notion that it is almost invariably in the parties'  
18 best interest to waive the confidentiality restrictions which characterize many of  
19 the national regimes to facilitate that process.

20                   We believe that the agencies need to do more to help the business  
21 community and their legal advisors to better understand the cooperative process,  
22 with particular emphasis on how voluntary confidentiality waivers can be  
23 beneficial to the merging parties. The lack of transparency which exists at

1 present makes it difficult to assess the benefits of voluntary waivers to the  
2 merging parties notwithstanding the agencies' assurances that it is in the client's  
3 best interest to do so.

4           In closing, we would offer the following recommendations  
5 respecting interagency coordination. In working towards these changes, we  
6 believe that the United States government and the agencies playing a lead role  
7 must present a consistent message to the rest of the world if serious progress is to  
8 be made. This requires both substantial coordination between the various United  
9 States government agencies and private groups involved in the formulation of  
10 competition and trade policy.

11           We believe that the Division and the Federal Trade Commission  
12 have done a good job in presenting a uniform and coordinated message to the  
13 international community. We believe that it's very important that they redouble  
14 those efforts, in particular in connection with their technical missions and the  
15 interagency consultation process. As the agencies consult with countries which  
16 are considering enacting an antitrust statute or modifying their existing statutes,  
17 these themes should invariably be part of that mission. Finally in this connection  
18 -- and this afternoon's session I think is a case in point -- we need to make sure  
19 that the **other** government groups -- for example, the U.S. Trade Representative,  
20 Departments of State, Defense, Transportation, Commerce, and Treasury, all of  
21 which have some role in developing trade and competition policy in their  
22 intergovernmental advisory capacities -- likewise need to be delivering a  
23 consistent message as to the need for avoiding unnecessary transaction costs in

1 the multijurisdictional merger review process as they pursue their individual  
2 missions as well.

3 That concludes my overview of our paper. Details are set forth in  
4 the paper itself, and once again I appreciate having the opportunity to make this  
5 presentation this morning. Thank you.

6 DR. STERN: Thank you very much.

7 We're not going to open it to questions until we've heard from the  
8 whole panel.

9 MR. PROGER: Harvey is now going to present our paper on  
10 Private Litigation and then Paul has some follow-up comments on both papers,  
11 and then we would be happy to take your questions.

12 DR. STERN: Excellent. Thank you.

13 MR. APPLEBAUM: It's a pleasure to be here again. As you know,  
14 I testified in my personal capacity in November, so I may have to exercise more  
15 restraint today since I am testifying on behalf of the ABA Antitrust Section and,  
16 as Phil indicated, as one of the ICPAC co-chairs along with Paul Victor.

17 Let me mention at the outset that, while we have prepared these  
18 papers, we'll continue to provide input. Paul and I both look forward to  
19 evaluating this Committee's report and undertaking our own analysis once there  
20 is an ICPAC report. That is another objective of the ABA Antitrust Section task  
21 force.

22 I am, as Phil indicated, going to provide a very brief overview of  
23 the Section's paper on the use of private litigation to challenge anticompetitive

1 conduct affecting U.S. foreign commerce. As you can see from the original  
2 calendar, Tad Lipsky of The Coca-Cola Company was scheduled to present this  
3 overview and Tad was the principal author of the paper, or at least responsible  
4 for pulling it together at the end. I only learned of Tad's absence on Saturday  
5 morning.

6           Just for your information, Tad is in London today, which probably  
7 reconfirms the globalization of the antitrust process in that one can cross the  
8 Atlantic on very short notice.

9           Members of the private litigation task force subgroup besides Tad  
10 were Margaret Guerin-Calvert, who is here with us today, Thomas Green, and  
11 Doug Rosenthal. Others contributed to the paper, particularly the development  
12 of the studies of the six cases.

13           There have been hundreds of private antitrust cases over the years  
14 that have involved foreign commerce and obviously there was neither time nor  
15 practicality to try and analyze even a significant number of them. What the  
16 subgroup did initially was to discuss which cases might be landmarks which  
17 would best identify and present the major issues that occur in cases that involve,  
18 one, foreign commerce and, two, almost invariably, the roles, the positions, and  
19 the policies of foreign governments.

20           The themes of these cases, as the paper indicates, present the  
21 issues which we believe that the ICPAC should consider. They were purposely  
22 also selected to reflect a mix of import and export trade, sometimes referred to as  
23 inbound and outbound.

1           These cases reflect the kind of well-known complexity of any kind  
2 of international suit, and I might note, not unique to private suits. When the  
3 Department of Justice undertakes in a suit involving foreign commerce, it also  
4 encounters problems of jurisdiction, discovery of relevant evidence, difficulty of  
5 enforcing judgments and the like. The procedural complexity of these suits is  
6 thus not unique to private litigation, and affects government suits as well.

7           More importantly, these cases typically involve issues which are  
8 by and large unresolved and complex, such as when to apply principles of  
9 international comity, when to sustain the foreign sovereign immunity defense,  
10 when to apply the foreign sovereign compulsion defense, when does the act of  
11 state apply, etc.

12           The Section in particular refers the ICPAC to its 1995 Section  
13 monograph entitled "Special Defenses in International Antitrust Litigation,"  
14 which deals with the particular defenses that occur in these cases. All of them in  
15 one way or another, as already indicated, reflect the potential interest or the  
16 potential role of a foreign government in a case involving U.S. foreign  
17 commerce, and that can be true whether it's export or import trade.

18           There was some consideration of whether to consider private  
19 litigation elsewhere. We decided to concentrate on U.S. litigation for several  
20 reasons: First, the Section believes that any consideration of the United States'  
21 role in international antitrust enforcement has to take into account our relatively  
22 unique private treble damage remedy. It is very popular, it is widely used, and  
23 while other governments are receptive to private complaints, they are usually

1 prosecuted in the form of government suits, not private suits.

2           Putting it another way, it is virtually impossible to consider  
3 international antitrust enforcement from the United States perspective without  
4 taking into account strongly encouraged use of private actions.

5           I have identified six issues and themes from the cases. They  
6 appear in both our executive summary and our conclusions. The executive  
7 summary which was inserted at the end is not totally overlapping with the  
8 conclusions, so one should read both of them to recognize the six themes.

9           The first theme is what mechanisms should courts employ, the U.S.  
10 federal courts, to obtain the views of foreign governments? Foreign governments  
11 often have a legitimate interest in these cases, but what procedures should be  
12 developed for their participation, and as the paper notes, if they so desire,  
13 governments sometimes as a matter of choice may decide they would prefer to be  
14 silent in these cases.

15           The second theme is whether there is a need for consistent  
16 principles in determining when United States antitrust rules and standards should  
17 be modified or adjusted to accommodate foreign laws and policies? The most  
18 recent interpretation in this area is the Supreme Court decision in Hartford Fire  
19 Insurance, which many have read to say that only a literal conflict, a clear literal  
20 inconsistency or conflict between the foreign law and the U.S. law, will cause or  
21 provoke a consideration of an adjustment.

22           The paper suggests that that standard may be too narrow for  
23 purposes of determining when U.S. law should accommodate foreign government

1 interests and policies.

2           The third theme is really a corollary of that. We are all familiar  
3 with the principle of international comity in these cases, the Timberlane doctrine  
4 and the like, but there is a question of consistency as to when and how the courts  
5 undertake their balancing, and it is a very complex and unsettled area. The  
6 Supreme Court decision in Hartford Fire does not necessarily contribute a great  
7 deal of enlightenment on the subject.

8           The fourth theme is an interesting one. Could one approach this  
9 subject somewhat similar to the well-developed United States state action  
10 doctrine? Mid-Cal Aluminum is cited in the paper. When a foreign government  
11 asserts it has an interest that it authorizes the challenged conduct or its law  
12 should be taken into account, should the U.S. courts inquire into whether the  
13 alleged anticompetitive conduct or restraint of trade was in fact authorized by  
14 and actively supervised by the foreign government? That is a doctrine that is  
15 fairly well developed in the United States.

16           The fifth theme is very familiar to Jim Rill. Some would call it the  
17 DOJ International Guidelines Footnote 159 controversy. That is, should the  
18 United States continue to take the position that export trade or export  
19 opportunities alone can potentially constitute a Sherman Act violation? This is  
20 the old issue of whether United States consumer welfare is being protected when  
21 only export trade is involved.

22           Perhaps more importantly, the paper suggests that it should be  
23 made clear in any event that the fact that export trade can be potentially covered

1 or challenged under the Sherman Act is not substantive; it is simply jurisdiction.  
2 If there is a challenge involving export trade, it still has to be shown there was  
3 substantive antitrust law violation.

4 This issue begins to dovetail with the broader issue that you were  
5 considering in November and continue to consider of whether if it is export trade  
6 or U.S. market access that is involved, whether the Sherman Act or the trade laws  
7 and trade policy are the better vehicle or approach.

8 The sixth theme is the more broader one, should there be any  
9 special procedural rules or limitations in a foreign commerce case. This is not  
10 necessarily a question of comity, but for example, should there be at least  
11 discretion on the part of the court to limit any damages to single damages?  
12 Should the court have the authority in foreign commerce cases when the  
13 defendant prevails to do anything with attorneys fees and in any event should  
14 attorneys fees or treble damages be awarded automatically in these foreign  
15 commerce suits?

16 Those six themes, which are found in the executive summary and  
17 the conclusions, are what the Antitrust Section suggests that the ICPAC  
18 Committee should consider. Thank you.

19 DR. STERN: Thank you.

20 MR. VICTOR: Thank you. Good morning. I have a little frog in  
21 my throat. I'll try not to -- what do frogs do? Croak?

22 MR. RILL: I don't know. You sound like you always sound.

23 MR. VICTOR: I was just listening to Harvey and one thought that

1 comes to me is actually a broader thought, which I don't know that I thought of  
2 before in the same way. But that is this committee might want to give some  
3 thought to what should the role of private litigation be today in the context of an  
4 effort to develop greater coordination, enforcement coordination and cooperation  
5 with other nations and other regimes.

6           Is there some benefits to gain by moderating or modifying our own  
7 private litigation rights in an international context when we are trying to bring  
8 along the rest of the world to see antitrust enforcement in a roughly similar  
9 context that we see it, although not trying to convert everybody to the exact same  
10 substantive or procedural standards? I don't know the answer, but it's just  
11 occurred to me that that's a more global question.

12           The only other thing I have to add as a preliminary matter is that  
13 we do have one additional working group on the task force, and that's a group  
14 that's working on the issue of enforcement policy and cooperation. I am told we  
15 are pretty close to having a paper for the task force and then the Section council  
16 and officers to consider and, assuming that that does follow a normal course,  
17 hopefully we'll have one additional paper to submit to this Committee for  
18 consideration.

19           Thank you.

20           MR. PROGER: I should mention that Jan had a scheduling conflict  
21 which she moved back to be here this morning, but unfortunately we are shortly  
22 going to lose her. Therefore, before she has to leave, we wanted to give her the  
23 opportunity to comment.

1 MS. McDAVID: Very briefly, I think the two papers that have  
2 been presented to you and the views of the members of the task force that will be  
3 presented today bring a unique perspective in that they really focus on the  
4 practical realities of how you approach these issues from an unbiased  
5 perspective, without the views of any particular client in mind, such as for  
6 example, Joe's paper on international merger review or the comments that Harvey  
7 and Paul have made with respect to private antitrust litigation involving  
8 multinationals.

9 I think that is almost a unique perspective because many other  
10 groups that will be presenting to you today have a particular interest or client's  
11 interest in mind. I think that is one of the unique benefits of an organization like  
12 the Antitrust Section, one of the reasons that all of us have been so proud for  
13 many years to have worked on it.

14 This is the finest tradition of the Section to make views known  
15 with respect to both policy questions and the practical realities, for example, of  
16 trying to figure out whether you've got 25 percent of the Belgium market when  
17 the law doesn't define how you figure out what the market is. You can usually  
18 identify the numerator, but figuring out the denominator is virtually impossible,  
19 and it's extraordinarily difficult, as Joe's paper really does explain.

20 This is an area in which the ICPAC can take a leadership role and  
21 accomplish some genuine benefits for multinational corporations.

22 DR. STERN: That completes your formal presentation. And we  
23 were planning to take a break before we started the Q's and A's. I'm aware now

1 that you're going to be leaving, which is too bad.

2 MS. McDAVID: Don't work around me.

3 DR. STERN: Well, I think I should at least give the opportunity to  
4 anyone, if they want to ask you questions before we break, to Janet, and then go  
5 ahead and break and then come back for Q's and A's for the rest of the panel.

6 MR. RILL: I'd just like to thank you, Jan, for adjusting your  
7 schedule to be with us today, and personally, and I think at least I can speak for  
8 my law firm, I'd like to wish you the best of good fortune for a superb year that I  
9 know you're going to have, following the superb year that Phil is still having.

10 MS. McDAVID: Thank you.

11 MR. RILL: Notice I said "is still having."

12 MS. McDAVID: One of the things we will do -- we will be very  
13 anxious to follow the work Phil has done in communication with the committee  
14 as you move forward with your actual recommendations.

15 MR. RILL: We very much appreciate that and we'll certainly make  
16 use of it.

17 DR. STERN: Indeed, these papers and your presentation today are  
18 extremely helpful. They're very much aligned with our requirements to come up  
19 with a set of recommendations which are practical and hopefully constructive.  
20 And your perspective that you've just added that you have tried to distill the  
21 thoughts and experience of the various practitioners in practical suggestions, is  
22 extremely helpful.

23 My only statement that I'd like to make for you to think about as

1 you leave and maybe as everyone has coffee right now is the statement that  
2 comes at the very conclusion of your first paper, which dwells on the importance  
3 of the European Union, that finding common ground with the EU perhaps holds  
4 the greatest promise. I had the cursory impression because I need to really study  
5 these papers which reflect a great deal of work, that some of the concerns, at  
6 least in the first paper, are looking at potential recommendations out of this  
7 committee applied to the whole world and how we relate with the whole world,  
8 whereas in fact you recognize that there is a daily convergence, if you will, on a  
9 very practical level, particularly with the EU, bearing in mind of course the  
10 importance of Canada in that statement as well.

11                   And so I would be interested in hearing what your optimal level of  
12 convergence and harmonization would be with the EU. And then what your level  
13 of comfort would be with countries other than the EU, perhaps in Canada and  
14 Australia. In other words, your take on all of this might be different if we were  
15 only asking you about a bilateral as opposed to a whole international set of  
16 recommendations.

17                   MS. JANOW: I'd like to just also extend my appreciation for all  
18 the work that's been done over many months, and of course I have some specific  
19 questions we can come back to, but I did want to share that, and also wanted to  
20 extend my appreciation for the clarity of these papers and their definitiveness.  
21 As a professor, I am very mindful that this be a business and policy relevant  
22 document that we produce ultimately and not one that is read mandatorily by my  
23 students alone.

1 MR. RILL: Notice she said alone.

2 MS. JANOW: So the definitiveness of the views, that is to say this  
3 is not a wishy washy set of papers. This is very clear as to what your participants  
4 thought would be useful. I think there are some dimensions that I'm hoping our  
5 discussion can amplify. If a perfect world does not close all of these gaps that  
6 you point to, what the consequences are of incompleteness, whether that's regional  
7 or more specific, and I think we need to talk about that a little bit more and hear  
8 your views.

9 But I just want to thank you for all the hard work and also for the  
10 business and policy-relevant focus.

11 DR. STERN: Okay. Let's take a break for 15 minutes for coffee  
12 and side conversations.

13 (Recess.)

14 DR. STERN: Well, let's resume the hearings where we left off,  
15 which was to have questions and answers of this panel of the American Bar  
16 Association Section of Antitrust Law Task Force for the International  
17 Competition Policy Advisory Committee.

18 Phil, would you like to perhaps -- you had some comments that you  
19 wanted to make. I think it wouldn't hurt to put that right on the record and then  
20 we'll just turn to questions.

21 MR. PROGER: Thank you. The only thing I was commenting to  
22 Paula when we recessed was that there is a noticeable dichotomy between these  
23 two issues. There is a general consensus worldwide that the concept of merger

1 review is a good concept, and we are trying to avoid undue burden on the parties.

2 But the concept of private litigation is very different. Private  
3 antitrust litigation is not accepted worldwide and there is a fairly extraordinary  
4 cultural clash between the United States and the rest of the world on the value of  
5 private litigation. I think that because of that dichotomy these issues pose a  
6 whole different set of issues for ICPAC to consider.

7 DR. STERN: Absolutely. Let's open it up to questions. Jim?

8 MR. RILL: Thank you. Again, let me express appreciation for the  
9 hard work that's been done.

10 I would like to pose a couple of questions, if I may, to Joe, and  
11 obviously anyone else on the panel. You suggest that initial filings should  
12 contain the minimum amount of information needed to determine whether or not  
13 there's a competitive issue. I'd like to ask you whether you think the U.S. current  
14 HSR form provides that information, based as it is on industrial codes that are  
15 developed for different purposes, and if you think it doesn't contain adequate  
16 information, what further information do you, speaking either in your personal or  
17 institutional capacity, think might be added?

18 MR. WINTERSCHEID: Well, first as to the Hart-Scott-Rodino  
19 form itself. Again, certainly it meets the minimal information requirement. In  
20 terms of whether it's the right information, obviously there are various schools of  
21 thought on whether the SIC code format is the right format. It does at least  
22 provide an objective way to present business information by product line,  
23 recognizing that it does not necessarily represent a properly defined product

1 market.

2           So I think that the SIC codes, while imperfect, certainly at least  
3 provide a baseline for providing the information. An alternative might be, in lieu  
4 of the SIC codes, reporting as to lines of business or product lines in the manner  
5 that the businesses themselves normally describe their businesses.

6           But I think what should be avoided, again coming back to the  
7 market share and market definition point, and one of the key objections that we  
8 have voiced with respect to the OECD common notification form, is to try and  
9 capture market definition and market share information in that initial filing.  
10 Market definition is usually contestable, and it is therefore not always  
11 necessarily clear in any given situation, and it really goes to the heart of the  
12 competitive analysis that the agencies need to undertake in their assessment.

13           MR. RILL: Thank you.

14           MR. PROGER: If you look at the form one has to make certain  
15 assumptions as to what particular questions were designed to do and, while I  
16 think that SIC code information does not necessarily properly define a relevant  
17 market, the parties are free to supplement that initial submission if they want to  
18 draw attention to what they think is the correct relevant market.

19           But sales by SIC codes is information usually maintained by the  
20 parties which allows the agencies to easily identify overlaps. And I really do not  
21 think it's intended to go much further than that. I would be concerned about any  
22 other type of requirement that required a more subjective information basis.

23           MR. WINTERSCHIED: Coming back to one of the points made in

1 our paper, you'll recall the legislative history of the Hart-Scott-Act itself, one of  
2 the key points was that the information called for should be limited to  
3 information maintained by businesses in the ordinary course of their business,  
4 that they should not be required to undertake significant information gathering  
5 simply for purposes of making their initial submissions.

6 MS. JANOW: I'd like to ask two merger questions if we're talking  
7 about mergers initially. One is given the differences in timetables, say between  
8 the United States and the EU, if some of these improvements were made you  
9 could still have a situation where, given the fixed timetable in Europe, that they  
10 would be, in effect, completing their process ahead of the U.S. process.

11 The more global question is, this Committee's been thinking about  
12 some of the issues that you've highlighted here in terms of problematic practices  
13 in foreign jurisdictions and how to encourage jurisdictions to address those  
14 deficiencies, move them away from market share and so on. And in the course of  
15 this Committee's deliberation a recurring theme has been leading by example as a  
16 stimulant for corrective action in those jurisdictions.

17 So my question to you is how does one stimulate change in your  
18 view in foreign jurisdictions with respect to these practices? What are the  
19 incentives? Certainly addressing our own imperfections is one way. But since  
20 we know that for some jurisdictions introduction of merger control and filing  
21 fees is the basis for legitimacy and worldwide turnover is a way to give  
22 jurisdictions a bigger role in the world than maybe they should, based on the  
23 nexus to the jurisdiction, how does one get over that mind set? Have you

1 deliberated on that point?

2                   MR. WINTERSCHEID: I'll deal with the second question first, if I  
3 may, because that also I think in part responds to Dr. Stern's earlier question on  
4 the importance of the EU. In terms of leading by example, the EU is particularly  
5 important, I think, in this process, because there are two basic world views as to  
6 merger notification process and procedure: the U.S. example and, generally  
7 stated, the EU example.

8                   In the scheme of things, the U.S. example is really the minority  
9 view, in fact, the distinct minority view. Those jurisdictions which are in the  
10 process of enacting merger control laws by and large are tending towards the EU  
11 format. Certainly, this is the case as to the EU member states and an increasing  
12 number of jurisdiction which are positioning themselves for ultimate accession to  
13 the EU.

14                  So recognizing the European Commission as an important  
15 constituency at least in part merely recognizes the very important fact that, in  
16 terms of counseling these jurisdictions, frankly, what the European Commission  
17 has to say in many instances will be as important, if not more important, than  
18 what the U.S. agencies are saying.

19                  The European Commission, in our discussions with them, seems  
20 generally sympathetic with many of these points. They recognize, for example,  
21 that their procedures, while perhaps suitable for a transaction with Community  
22 dimension, which by definition is a significant transaction with potential  
23 significant effects within their jurisdiction, may not be suitable as a model for

1 national legislation absent an adequate local effects impact. Absent such an  
2 impact, I believe that the European Commission is sympathetic to the view that  
3 the Form CO format may impose unreasonable burdens or has the potential to  
4 impose unreasonable burdens on parties.

5           You also see aspects of the EU procedures that have been  
6 incorporated in national jurisdictions in ways that they were not really intended  
7 to be used. For example, the market share-based jurisdictional test seems to have  
8 been derived from the EU's "affected market" test, which defines your reporting  
9 obligations -- that is, how much information you have to give -- not whether  
10 notification should be required.

11           So the EU is an extremely important constituency in terms of  
12 leading by example. Certainly the U.S. agencies need to lead by example and to  
13 help to educate jurisdictions as to the burdens that are involved and the  
14 sometimes unintended burdens imposed on their own agencies that might not be  
15 necessary to accomplish their enforcement mission. But the agencies must also  
16 enlist the assistance of the European Commission in leading by example as well.  
17 In educating jurisdictions as to issues and problems presented by the EU format,  
18 a format which may or may not be the appropriate model to be adopted in  
19 particular situations, the European Commission will undoubtedly be even more  
20 influential than the U.S. agencies.

21           In terms of incentives, I think that there are clear incentives to  
22 streamline the process, both in terms of interagency coordination and in terms of  
23 promoting compliance with local law. I think, unfortunately, that one

1 consequence of the overexpansive jurisdictional tests is that companies are really  
2 becoming somewhat selective in complying with international premerger  
3 notification requirements, because the tests are subjective, because compliance is  
4 unreasonably burdensome, and because risk of actual enforcement is oftentimes  
5 non-existent.

6               So in terms of promoting compliance and corporate good  
7 citizenship in a global environment, I think that streamlining the process would  
8 promote those objectives and, correspondingly, should incentivize the local  
9 jurisdictions to think seriously about these issues.

10              As to the timing in the EU, the dyssymmetry in the EU timeline as  
11 to transactions that are investigated is generally not a serious issue because once  
12 again you can manage the timing process. In the U.S., again, you can initiate the  
13 HSR process at the letter of intent stage. The EU process can't be initiated,  
14 formally at least, until you have a definitive agreement. So there's a built-in  
15 cushion, if you will, that in most instances tends to equalize the review periods  
16 as a practical matter.

17              On a going forward basis, assuming that the EU would permit  
18 filing contemporaneously based on a letter of intent, then, yes, there could be a  
19 greater potential for serious issues arising just from the timing of the review. I'm  
20 not sure, again given the very strict deadlines that the European Commission  
21 operates under, that there's any easy solution to those problems.

22              But still the fact remains, again focusing on those transactions that  
23 don't raise serious issues on the merits, I think the business community is better

1 off in having a common time frame, recognizing that in those transactions where  
2 there are serious substantive issues that there are going to be some necessary  
3 dyssymmetries in the actual review processes.

4 MS. JANOW: Thank you.

5 DR. STERN: Paul.

6 MR. VICTOR: I was going to make a couple of different comments  
7 on timing. Of course, if you get clearance from one of the jurisdictions in  
8 advance, that's wonderful from the standpoint of the client. If you don't get  
9 clearance, if there's a problem that surfaces, you're going to know about that  
10 anyway, and you're going to be well aware of whether or not that problem is  
11 going to have an overlap in the other jurisdiction and be able to deal with the  
12 implications of that.

13 As to how to stimulate change in foreign jurisdictions, I don't think  
14 we should lose sight of the fact that what's happening today informally is  
15 probably stimulating more change than might happen formally in the sense that,  
16 Merit, you were in Berlin, Jim, you were in Berlin, and we all heard Joel talk  
17 about how the European Community and the United States antitrust authorities  
18 are working these days almost as a seamless web. I think those were his words.

19 And, of course, they're learning from shared experiences. They  
20 apparently speak to each other with great regularity and, even though the written  
21 rules and regulations may be different, and they have to of course be mindful of  
22 that and apply them as they are required under each jurisdiction, nevertheless the  
23 pragmatic aspects of coordination tend to be taking place in many situations

1 today even on an informal basis and you can have influence that way.

2 MR. WINTERSCHEID: Merit, could I come back to one additional  
3 point that Paul's comments raised. Again, on timing generally and also on our  
4 overall initiative in consulting on a bilateral basis and what can realistically be  
5 achieved and what the incentives are, all of these issues are interrelated.

6 I think, as Paul notes, when you are working on a transaction you  
7 know pretty well up front if you're going to have serious issues on the merits in  
8 the United States, in Europe and other foreign jurisdictions. And so you can  
9 manage the process with that in mind.

10 The focus, again, needs to be on those transactions which do not  
11 raise serious issues on the merits, and that really is a thread that runs throughout  
12 this discussion. In terms of how to incentivize other jurisdictions to make  
13 certain changes, these incentives are less of an issue as to transactions where all  
14 parties can agree that there is no competitive issue than in those situations where  
15 we're trying to solve the imponderables, as in Boeing-McDonnell Douglas, for  
16 example.

17 So I think that by keeping our focus generally on those  
18 noncontroversial transactions, a great deal of good can be done for the business  
19 community in streamlining the process and eliminating unnecessary transaction  
20 costs.

21 MR. RILL: Joe, let me if I may just pick up on this. I agree that a  
22 lot could be accomplished in the area where there's no issue in one or another  
23 jurisdiction. I don't think we should turn our back and I don't read you as

1 suggesting that we should turn our back on those areas where there are  
2 overlapping or converging issues that do raise questions concerning a  
3 transaction.

4           In fact, I read you as saying in the mature jurisdictions leading by  
5 example is a good thing; I think you would suggest that it's a good thing in  
6 substance as well as procedure; that convergence, sensible convergence, in  
7 substance is probably a good thing; and to pick up on Joel's lattice of bilaterals,  
8 that cooperation is a good thing.

9           Now to jump to another point you made, at least one of the  
10 elements where the business community could profit by enhanced cooperation  
11 which could result from enhanced information sharing and voluntary waivers of  
12 confidentiality restrictions. I would like to ask you and the rest of the panel to  
13 comment on that, but in addition to that to put the question back to you that you  
14 put to the agencies: What do you see as the benefits to private parties to grant a  
15 waiver of confidential information under, let's assume, appropriate downstream  
16 confidentiality protections?

17           MR. WINTERSCHEID: We're certainly not suggesting that  
18 contested transactions be ignored altogether. But the bottom line there, as the  
19 agencies have indicated, is that in those situations the right course is probably  
20 through the bilateral discussion process and achieving consensus through those  
21 means, as opposed to broad-based initiatives directed at substantive convergence,  
22 at least at this time.

23           As to the information-sharing point, certainly in a number of

1 transactions there are clear benefits to be achieved from waiving confidentiality  
2 so that the agencies can coordinate their investigations more effectively and  
3 thereby hopefully decrease the burdens on the parties. Certainly, there are  
4 situations where in dealing with potential remedies it is essential that the  
5 agencies have the ability to communicate freely so that they can work together  
6 and affect a "one-stop shop," if you will, as to possible remedies that would be  
7 satisfactory to both or all of the jurisdictions involved.

8               So there certainly are circumstances where there are benefits to  
9 waiving confidentiality. I think the principal point, though, is that it's not clear  
10 that in all cases that's necessarily the case. And the agencies have not really  
11 provided much guidance, at least in my experience, as to the specifics of the  
12 coordination process, other than in broad brush, to help us to educate our clients  
13 as to why it is inevitably in their best interest to do so.

14               Indeed, there has developed something of a presumption -- first I  
15 think unspoken and now a spoken presumption -- that if you have any hesitation  
16 about granting a waiver that necessarily means you must have something to hide.  
17 This I think is an unfortunate development in the overall process, which doesn't  
18 promote the overall objective in achieving greater transparency so as to permit  
19 the parties and their legal advisors to make more informed decisions as to those  
20 circumstances when a waiver is in their best interest, again assuming that  
21 downstream confidentiality and the confidentiality issues are adequately  
22 addressed.

23               MR. RILL: Phil?

1                   MR. PROGER: I want to go back to what has been raised as to  
2 what the United States can do in terms of worldwide leadership on competition  
3 issues. I think we have to be realistic about our role and our ability to lead in  
4 this area. We are such a large country, we are so powerful, we are the first mover  
5 in this area, that we intuitively feel that we should be the leader here.

6                   But, I think it is difficult for us to be a leader for a number of  
7 reasons. Joe mentioned several. First, there are a number of countries that want  
8 to be part of the EU and therefore are more inclined to follow the EU rather than  
9 the U.S.

10                  But the underlying cultural and political substance is the one that  
11 really is the most difficult for us to overcome. Our system, which has as its  
12 anchor enforcement through the courts, is intuitively different than the rest of the  
13 world and they are less comfortable with it. If you are a nation trying to develop  
14 a set of competition principles, it is far easier to set up a competition  
15 enforcement agency modeled after the EU. So I think we have to be realistic that  
16 our system is not necessarily intuitively the one that people will gravitate  
17 towards.

18                  The second thing is that there already is a lot of bilateral  
19 cooperation among enforcement agencies, particularly the U.S. with DG-IV,  
20 Canada, Germany and other more developed enforcement regimes. That  
21 cooperation likely will increase.

22                  I think bilateral cooperation is important, but we should not  
23 confuse that with the substantive analysis. While there is a process advantage to

1 one-stop shopping, that does not necessarily mean you are going to have one-stop  
2 answers.

3 I think it is particularly important to note that antitrust competition  
4 analysis by its very nature is fact-intensive and often locally fact-intensive. So  
5 even though you get the one-shop advantage, you may get different answers. For  
6 example, the effect in the United States may be different than the effect in  
7 Europe.

8 Last and I do not think least, I think that there are things that can  
9 be done that will reduce the procedural differences, but in so doing I would urge  
10 ICPAC to be very careful to make sure what we don't end up with is the lowest  
11 common denominator so that everyone gets, as someone said before, a Christmas  
12 ornament and what we end up with is a more burdensome.

13 DR. STERN: Those are three very wise comments. On the first  
14 one, this common law court enforcement that is the anchor for our system  
15 reminds me of the point that has been made actually several times now both by  
16 you, Joe, and particularly in this footnote in the first paper on page 22, which  
17 talked about "The U.S. agencies may need more information than their EU  
18 counterparts in order to be ready to litigate a preliminary injunction case," and  
19 then the footnote is dropped that says: "There are grounds to question the  
20 legitimacy of this concern. The HSR process was designed to give the agency  
21 sufficient information to determine whether or not to challenge a merger.  
22 Preliminary injunction merger cases frequently involve extensive expedited  
23 discovery in which the agency can seek to enhance its litigation position."

1                   It's this kind of morphing, if you will, of what may have been  
2 original intention into something that, because of the litigation potentials, has  
3 created a different outcome than that which even the policymakers, in the form of  
4 members of Congress and the President who signed the HSR, had in mind in the  
5 first place.

6                   I wonder how we get back, if you will, to that starting point,  
7 because in a sense that's where we are now.

8                   MR. WINTERSCHEID: These comments obviously go not to the  
9 initial filing but to the second request process.

10                  DR. STERN: Right, but it relates to something you had already  
11 said in the context of what had been the initial intentions.

12                  MR. WINTERSCHEID: That's true. And the second request  
13 process has been the subject of concern and debate for as long as the HSR Act  
14 has been in place, with successive commitments by the agencies to review the  
15 process and successive drafts of the model second request and so forth.

16                  Without question, turning to the investigative phase and as pointed  
17 out in our paper, the HSR Act second request process in itself is unduly  
18 burdensome as it presently stands. What can be done as a fix comes back I think  
19 to Phil's point and it's been made elsewhere, that at that point it is a prelitigation  
20 process, for better or worse.

21                  But that's not to say that the agency should have unfettered  
22 discretion in the process. And some suggestions have been made respecting  
23 avenues of review for substantial compliance outside the agency or expedited

1 review within the agency as to substantial compliance. Those are all avenues  
2 which should be explored, but I'm not sure, again given the litigation focus, that  
3 there's going to be an easy solution that will satisfy the agencies that they have  
4 access to all the information that they need.

5           At the same time, I don't think that there's any serious debate that  
6 the process does generate more information than could reasonably be expected to  
7 be used or that is even relevant. I mean, the second request process is really used  
8 as a means to cover all the bases, which is understandable in a prelitigation  
9 context, but still gives rise to situations where undue burden is clearly imposed.

10           DR. STERN: Well, it relates to this overall cultural difference that  
11 we in the U.S. are challenged by if we're going to talk about convergence with  
12 other nations and other cultures and make recommendations, at least in this field,  
13 that will have some possibility of being persuasive.

14           And to the extent -- I guess this is just to underline Merit's request  
15 -- that you have further thoughts on how we can be persuasive in leading by  
16 example or other ways, it would be most helpful.

17           MR. PROGER: I'm not going to speak now for the Section because  
18 I do not think we've vetted this. But I think the agencies have articulated two  
19 separate and distinct concerns for the reason why they have to be as thorough on  
20 the second request. They sound similar, but they are really different.

21           DR. STERN: Okay.

22           MR. PROGER: One is prelitigation preparation; the second is  
23 assessing their chances of success in litigation. If the concern is litigation

1 preparation, then there could be a process where there are two second requests,  
2 an extensive one and a second one that is more narrow -- and this is not an  
3 original idea with me; someone else suggested this to me -- but the second one  
4 being with the stipulation that if it goes to litigation the parties will not oppose  
5 reasonable expedited discovery.

6                   If the concern is the second articulated reason, that I as the  
7 Assistant Attorney General in charge of the Antitrust Division or we collectively  
8 as five Commissioners who are required to make a judgment and that judgment  
9 incorporates what our likelihood of success will be in litigation, I do not know  
10 how you ever curtail the Second Request because you are in a virtually endless  
11 desire for information.

12                   Some of the more recent second requests -- and I'm sure ICPAC can  
13 get access to them -- are running 90 to 100 pages and require the production of  
14 thousands of documents. So I think there is a real practical problem here.

15                   DR. STERN: Thank you.

16                   Merit.

17                   MS. JANOW: Could I shift us to the private litigation paper for a  
18 minute?

19                   DR. STERN: Sure.

20                   MS. JANOW: I thought this was a very interesting paper and it  
21 was a delicious appetizer to the questions that you've raised. I just wanted to  
22 invite you to share with us where you'd go with some of your suggestions.

23                   First a statistical point. It's very interesting that there's been this

1 dramatic drop-off in private litigation. What dimension of that is of an  
2 international nature was something that we have been trying to better understand.  
3 If you have developed a methodology to see whether or not the international  
4 aspect is constant or increasing in an environment of declining private litigation,  
5 that's not only statistical, but it's also a question about what is the environment.

6 I guess the related question: It's often assumed that the private  
7 litigation, particularly with respect to outbound, can be linked to government  
8 action; so whether or not you are finding any correlation there with respect to  
9 either outbound or inbound?

10 The broader question I have for you is where you might recommend  
11 your themes taking us. For example, there have been lots of proposals advanced  
12 by different groups, including the ABA Special Committees, about additional  
13 mechanisms that courts could employ to get the views of foreign governments, be  
14 that through a more formalized amicus proceedings or otherwise, or what could  
15 be done to establish more consistent principles for accommodation, given the  
16 questions raised by Hartford Fire.

17 The Justice Department has elaborated its own comity elements  
18 and those are in the International Guidelines and elsewhere. Does one need to do  
19 something different or more to establish more opportunity or possibility of  
20 consistent application by the courts and, if so, what would that be?

21 Some have talked about guidelines for comity like the sentencing  
22 guidelines more specifically. So I would invite you to comment on where your  
23 themes take you.

1           The last one I think you mentioned, Harvey, one of the last ones,  
2 was discretion to limit damages perhaps in foreign commerce cases as well as  
3 attorneys fees. That raises this intriguing question of is this a de-trebling  
4 suggestion? If so, does one de-treble only in foreign commerce or where are the  
5 parameters here and how does one ensure that the approach is not discriminatory  
6 in its impact?

7           So I'd just invite you to share with us wherever you'd like to go  
8 further with respect to the very important themes you've suggested that we focus  
9 on.

10           MR. APPLEBAUM: You have asked a number of questions and  
11 there are many others here who can respond to them besides me. I will respond  
12 and ask Meg if she wants to comment since she was on this task force.

13           I am not sure it can identify or compare the decline in foreign  
14 commerce cases to the general decline. I would assume they are similar. We  
15 could discuss some other time the reasons for the declines.

16           The Section certainly is not here advocating the elimination of the  
17 treble damage remedy, but it obviously has occurred in some contexts. I mean,  
18 the notion is not radical because we have elimination with certain joint ventures  
19 and export trading companies.

20           But the thought here was that in a case that involves imports or  
21 exports, or a multinational or a foreign plaintiff or defendant, we should develop  
22 criteria for single damages.

23           One potential theme is cases where there is some element of a

1 defense or some element of the case involves foreign government activity -- in  
2 any of those defenses enumerated or any time that a defendant argues, I had to do  
3 this because the foreign government compelled me to, asked me to, suggested I  
4 do it, or what I did was consistent with foreign government policy and the like.

5           The main theme is where there are legitimate foreign government  
6 or maybe even foreign multinational private interests, to what extent should the  
7 courts, as they do from time to time and as they have over the years in applying  
8 comity or with other principles, accommodate or adjust U.S. antitrust law?

9           It is this dimension of private litigation which makes the U.S. both  
10 unique and makes it more difficult to deal with in the international context.

11           Meg, would you like to comment? And maybe Paul would also  
12 like to comment?

13           MS. GUERIN-CALVERT: To start off with, we chose the six cases  
14 on the basis of trying to have three that were representative of inbound and three  
15 representative of outbound. We found was that the distinction between inbound  
16 and outbound was not as important a distinction as the idea of trying to look at  
17 where had there been private litigation that, without government intervention,  
18 was designed to try to enhance competition.

19           So in looking at that, one of the things that struck the working  
20 group as we were examining each case and writing up summaries of the various  
21 cases is how in each there was the following issue: was there a clear system in  
22 place by which, ahead of time, the plaintiffs and the defendants would know the  
23 extent to which foreign government approval, oversight, or policy -- that is,

1 something akin to state action -- could be brought into play as a defense? In  
2 particular, the working group found that in the various cases and decisions such  
3 issues were being brought up as a defense and in amicus briefs being filed on  
4 behalf of the defense. There was, however, no clear standard articulated for how  
5 or whether or not the U.S. court would be allowed to ask for articulation of the  
6 foreign government's policy, whether or not they could require it and, once it  
7 was obtained, how it should be balanced against other issues.

8               In our written submission to you we raised a number of issues; this  
9 one seemed to be the one to focus on the most significantly. It goes to comity  
10 but also somewhat broader in terms of the issue: "is it possible to have an  
11 articulated set of principles or guidelines that would apply to a court that would  
12 be generally recognized, that would at least set up the process by which a foreign  
13 government's input could be requested, required, or utilized."

14              On your narrow comment, I know that in some of the data they do  
15 involve foreign claims, and we could check to see whether there's a separate  
16 tracking that would specifically identify federal cases.

17              DR. STERN: Thank you very much.

18              MR. VICTOR: May I? I have a few comments to make.

19              First of all, with respect to private litigation involving  
20 international aspects, I don't know that there's anything unique about that vis-a-  
21 vis domestic. I think if Joel and Gary continue on their quest for international  
22 cartel activity and are successful in bringing indictments, you're going to see  
23 cases involving foreign defendants and international activity as the aftermath in

1 the treble damage context.

2           With respect to noncriminal-related type of conduct, I think that  
3 there's relatively little unique with respect to the international context via-a-vis  
4 with respect to the domestic context. It's the evaluation by the plaintiffs as to  
5 whether they think they can achieve relief, whether monetary or injunctive relief,  
6 and in that sense it's affected by the wave of private actions and the trend of  
7 decisions and the infusion of economic thinking that has happened in the last 15  
8 years, which probably is a large contributor to the decline of private litigation in  
9 general.

10           With respect to this whole business about comity and foreign  
11 governments making known their views and the like, once again, in the private  
12 litigation context it's not the government, so you're not thinking government to  
13 government. You've got litigators, you've got people fighting. You've got  
14 private interests fighting for a particular objective regardless of how they obtain  
15 it, utilizing the courts, presumably properly, and the law, properly -- otherwise  
16 you're not going to achieve the objective.

17           And a private plaintiff doesn't care about comity as such. I mean,  
18 they don't have to evaluate what the sensitivities are. They go ahead and plow  
19 ahead and bring suit, and let the courts worry about it if it's a proper thing to do  
20 in a particular case.

21           I don't recall what the latest status of the law is, but my view has  
22 always been that comity is not jurisdictional in nature, but rather an issue of  
23 whether or not a court should proceed with a proceeding. That is, the statute

1 gives the jurisdiction, and the issue as to whether to proceed depending on the  
2 sensitivities involved (comity) is a different though related issue.

3 But private parties on the plaintiff's side are certainly not going to  
4 be too concerned about comity situations or looking for some perfect-world  
5 solution in that context. They're likely to try to pick courts that they know are  
6 going to favor their position if they can otherwise get into that particular court,  
7 that venue, rather than a court which looks at it differently.

8 As to the views of foreign governments in these cases, from my  
9 own personal experience so far, I've been involved in one or more cases where  
10 this has played a role. Remember, the issue is one of foreign sovereign  
11 participation or encouragement versus compulsion. As a matter of law, there's no  
12 defense for encouragement or participation. There's only a defense for  
13 compulsion.

14 So again, courts may have to grapple with that sort of thing, but it's  
15 not the proper venue necessarily to deal with that issue. The issue is more  
16 properly dealt with in the actual law itself and perhaps some negotiation of  
17 common views by governments.

18 I think that's about it.

19 MS. JANOW: Thank you.

20 MR. RILL: I'd like to follow up on that and on another issue. I  
21 made a note to ask you all to determine whether or not act of state would be  
22 applicable in an international context. I think you're right. I think it's only  
23 where there's foreign sovereign compulsion. So that the Mid-Cal principle

1 wouldn't apply, I think, in an international context.

2           We have to make policy determinations and one question is, and it  
3 relates to the efficacy of cooperation; should the United States government -- and  
4 the issue is before the OECD right now -- advocate private litigation options in  
5 foreign jurisdictions? And what would be the efficacy of that advocacy in your  
6 opinion? What incentives would foreign governments or foreign legislatures  
7 have to be sensitive to for such advocacy?

8           MR. VICTOR: If I may, my personal view is that that's probably  
9 not the issue the U.S. Government should be pushing for. That gets into a  
10 tremendous culture issue as to how foreign countries view litigation and the way  
11 in which persons or entities resolve conflicts between themselves.

12           I think that the U.S. Government probably has enough on its  
13 agenda to try to deal with the pragmatic problems of coordination and  
14 cooperation that would involve government enforcement authorities rather than  
15 to take on the effort of persuading other countries that treble damage or even  
16 single damage type actions are something that they should seriously consider.

17           I think those countries are not blind to what exists here and most of  
18 them seem to criticize our approach. We're probably not likely to succeed even if  
19 we undertook such an effort, but I'm doing this off the top of my head.

20           MR. RILL: Suppose there were a modification of our approach  
21 along the lines that Harvey's suggesting, a de-trebling or court discretion in the  
22 grant of attorneys fees, as an incentive? I don't want to pursue this too much  
23 longer, but it is a policy question that's on the table at OECD and one that we

1 want to address.

2 I'll just ask one more question --

3 MR. APPLEBAUM: Let me just mention, the paper does  
4 specifically address that. It states: "In light of the spectacular worldwide  
5 proliferation of antitrust laws in the past decade -- still underway -- it is doubtful  
6 whether there is any generalized need for enhanced private antitrust litigation  
7 under foreign regimes as a means of addressing private anticompetitive conduct,  
8 including conduct that may restrain U.S. foreign trade."

9 MR. RILL: I take it that's a no as to advocacy.

10 MR. APPLEBAUM: That's a generalized no, the Section Task  
11 Force believing very much along the lines of what Paul has said, that we have our  
12 own unique phenomenon. As Phil has mentioned, our treble damage system is  
13 pretty universally criticized. It would not make a lot of sense to, if we're  
14 thinking about restraints on U.S. export trade, urge private litigation rights under  
15 foreign antitrust laws.

16 DR. STERN: What page were you quoting from?

17 MR. APPLEBAUM: I was reading from page 2.

18 DR. STERN: Thank you.

19 MR. RILL: I'm going to have to excuse myself in a minute, but I  
20 do want to come back to a question that Joe raised, and I think it has some very  
21 interesting implications, and that is the united front comment. I think that the  
22 united front between FTC and DOJ is working quite well in general terms.

23 But you also raised the issue of other agencies having antitrust or

1 quasi-antitrust or at least some competition responsibilities. I wonder if you or  
2 the other members of the panel would suggest as a response to that that the  
3 competition authority, the Department of Justice or the FTC, have a seat at the  
4 table in White House deliberations on competition policy. This should, perhaps,  
5 be the case in instances where specialized agencies have a seat at the table, or as  
6 I think Commissioner Powell of the FCC has proposed, that competition  
7 decisions by the antitrust agencies be binding on other deliberations -- universal  
8 service, for example -- by the specialized agencies.

9                   MR. WINTERSCHEID: I think certainly the antitrust agencies  
10 should play a leading role, if not the leading role, in developing our competition  
11 policy portfolio in the international community. How that is formalized, I'm not  
12 sure I have a direct view in terms of having a "seat at the table" in a formal  
13 sense. Certainly they should be at the table when those decisions are being  
14 made, and in addressing issues as fundamental as, in developing countries, do we  
15 really want to promote the enactment of competition laws at any given stage of  
16 their economic development, and, assuming that the answer is yes, how that  
17 policy is developed consistent with, not just U.S. business interests, but, more  
18 fundamentally, with the effective enforcement of competition law principles on a  
19 global basis.

20                   That's one of the main thrusts of our paper. Because of their  
21 experience and their sensitivities to the real world issues presented by global  
22 enforcement, it's critical that the antitrust agencies play a leading role in the  
23 development of the policies that are being articulated by other U.S. government

1 agencies in other contexts.

2 MR. VICTOR: I would echo that thought. I think our competition  
3 agencies are not only sophisticated, but they are clearly the only agencies that  
4 really have an understanding of competition issues. My impression is that the  
5 other agencies that deal with those issues really do not have a deep understanding  
6 and/or appreciation of the issues themselves, much less how those issues would  
7 fit in and be considered in the context of the particular problem that's being  
8 addressed by the various agencies considering an issue. So I would strongly echo  
9 that.

10 Without taking sides -- and working on the basis of anecdotal  
11 information -- I think what happened in the Fuji-Kodak situation reflects the  
12 absence of in-depth understanding of competition issues by at least one of the  
13 agencies that was involved.

14 MR. APPLEBAUM: I also agree with what Paul and Joe said. But  
15 more broadly, there was a colloquy here in November on the whole issue. The  
16 fact that generally speaking the WTO doesn't cover, arguably doesn't cover,  
17 competition policy or, if it does, it's under nullification and impairment, and the  
18 problem of having the United States Trade Representative in Section 301 cases  
19 deal with complex issues of competition in the Japanese market is a formidable  
20 challenge.

21 The USTR has just announced an interim decision involving an  
22 alleged anticompetitive restraint engaged in by the government of Mexico on  
23 exports of high fructose corn syrup from the United States. If you consider the

1 allegation, it's a traditional boycott type issue, antitrust issue. But the question  
2 of whether the Mexican government was involved is a fact question, and what  
3 impact it may have had in the Mexican market is before the United States Trade  
4 Representative.

5               What Paul and I are saying is the Kodak-Fuji case involved a  
6 non-antitrust, non-competition agency -- and that is not a criticism of the USTR.  
7 I question whether the USTR has the resources or the experience or the depth of  
8 expertise, that is antitrust or competition law expertise, to deal with issues like  
9 Kodak-Fuji.

10              MR. PROGER: I agree with the comments that have been made. I  
11 think that actually your question touches on almost every issue we have dealt  
12 with today. And it starts with one fundamental point that we have not really  
13 talked about. Competition policy is a public interest, but it is not the only public  
14 interest.

15              One of the things that we in the United States at times have been  
16 severe in our criticism of other competition regimes is that they bring in other  
17 public interests. Yet we have the FCC, the FERC, the Federal Energy Regulatory  
18 Commission, Surface Transportation Board. We have agencies where we bring in  
19 other public interests in their deliberations.

20              So, in answer to your two questions: One, we would be better off,  
21 if we are going to have within our government some entity in which competition  
22 expertise and policy resides, it should be the competition agencies and not  
23 agencies that regulate specialized industries. To the extent that there are other

1 public interests, there has to be coordination of those interests within our  
2 government.

3           That gives rise to the second point. I think competition policy  
4 should be given an equal seat at the table within our government as that given  
5 trade policy. I think both are important to national public interest. So right now  
6 trade is there, competition is not. That does not strike me as an appropriate  
7 perfect balance.

8           But the last point raises an interesting point, the one Harvey raised  
9 on the Mexican corn. Here I am truly speaking for myself because, as the Section  
10 papers point out, we are not for proliferation of private litigation.

11           But the Mexican point raises an interesting point. The U.S. created  
12 the private attorney generals to say that there are other ways of enforcing  
13 antitrust laws other than through government action. There are limitations to the  
14 resources of the government, so we created the private attorney general as an  
15 additional plaintiff.

16           That has led in some cases to abuses. Notwithstanding that, in  
17 situations where we as a country want to promote worldwide free markets and  
18 open market access, I do wonder whether having some system where, despite the  
19 fact that the foreign government does not want to enforce the law, a private party  
20 victimized by an anticompetitive effect might seek redress in two ways.

21           One, it might stop the process of U.S. courts now reaching way out  
22 to get at conduct that is probably beyond us, but for which the party does not  
23 have any other immediate venue to seek redress; and two, it might lead to greater

1 open access and freer markets in other countries.

2 DR. STERN: Where would it be, where would this thing be  
3 located, this ability? Would it be within the U.S. Government?

4 MS. JANOW: Can I give a footnote on that?

5 DR. STERN: Yes.

6 MS. JANOW: One approach that has been taken, obviously, in the  
7 SII negotiations and others, is that for those jurisdictions that have chosen to  
8 have private litigation, that they make that effective within their own systems,  
9 that the impediments to effective litigation be removed, whether those be filing  
10 fees or presumptions or so on.

11 So rather than being an advocate necessarily in whole cloth, being  
12 an advocate in those jurisdictions that have chosen, that would be one approach.

13 MR. PROGER: There is an obvious difficulty going forward. You  
14 are really raising a much broader question for the foreign nation and its society.  
15 Does it want to have an effective judicial system and a system of private redress?

16 I do not think you are going to create this solely to deal with  
17 competition issues. You have to first have in the foreign jurisdiction an innate  
18 belief that there needs to be a judicial system which provides private redress.

19 MR. WINTERSCHEID: It's important not to lose sight of the fact  
20 that in many jurisdictions, and particularly in Europe, there **is** a private right of  
21 action. The point is that it's not exercised. So technically it's there, but again it's  
22 a cultural issue as much as anything else.

23 The other footnote to proposing expanding those rights of private

1 action in foreign courts under foreign systems, is the potential effect that that  
2 may have on the rights of U.S. litigants. In particular I'm thinking of the Second  
3 Circuit's 1998 decision in Westminster Bank, where a private U.S. antitrust  
4 action was dismissed on *forum non conveniens* grounds because the United  
5 Kingdom has a private right of action. Never mind that there was no inquiry as to  
6 whether it's an effective right of action, having determined that there is  
7 technically a private right of action in the UK, the U.S. case was dismissed.

8               So in terms of the need for clear rules, to the extent that the  
9 existence of foreign private rights of action are going to be grounds for  
10 dismissing U.S. antitrust actions, it seems to me that this is another area where  
11 clear rules should be established so that the U.S. district courts aren't dismissing  
12 meritorious rights of action in the United States merely because of the theoretical  
13 availability of a private right of action in some foreign jurisdiction.

14               DR. STERN: I keep coming back to this page 3 of point C, in  
15 which you have stated that "ICPAC could help to increase awareness that neither  
16 a direct, substantial and reasonably foreseeable effect on U.S. import commerce  
17 nor the denial of a U.S. export opportunity constitutes a substantive antitrust  
18 violation in itself." You're saying that this would be useful if the Committee  
19 made that very clear and repeated that mantra.

20               I keep looking at this thing thinking about Section 301, because  
21 you're saying if we did that, "clarification" -- I'm quoting -- "will simplify debate  
22 and permit the recognition and distinct treatment of market access remedies  
23 based on substantive standards different from those of antitrust law."

1                   Are you stating that Section 301 should never be used in the  
2   pursuit of a case in which even there's been a display of an adverse effect on  
3   competition? What are you saying here?

4                   MR. APPLEBAUM: Item C in the executive summary on page 3  
5   has to do only with the Sherman Act. It is not commenting on Section 301. In  
6   fact, the paper doesn't comment on Section 301 at all.

7                   DR. STERN: I know. But I can't help but --

8                   MR. APPLEBAUM: Paul and I, and Phil maybe, have commented  
9   outside of the paper on Section 301. But this is an issue of long standing and I  
10   have referred to the fact there was at one time in the Antitrust Guidelines of the  
11   Department of Justice a footnote that provided that where U.S. consumer welfare  
12   was not affected, i.e., exports, that at least the Department of Justice would not  
13   exercise any jurisdiction.

14                  That was later reversed by the Department of Justice --

15                  DR. STERN: Right.

16                  MR. APPLEBAUM: -- when Jim Rill was Assistant Attorney  
17   General, and there remains a longstanding debate.

18                  I think that the concern that the Section had with this approach is  
19   that it leads to the impression that there is a Sherman Act violation every time a  
20   U.S. exporter is barred from a foreign market. The point is that, like any other  
21   antitrust case, whether it's private or governmental, there has to be a showing of  
22   either a per se violation or a rule of reason, unreasonable restraint of trade. That  
23   is, the denial of an export opportunity alone is not an antitrust violation.

1           The Section in a sense has raised the broader issue of whether that  
2   should be considered an antitrust violation at all. There are different views on  
3   that issue among antitrust practitioners. But obviously, if it is not an antitrust  
4   violation, that does not mean it is not a market access issue under the WTO  
5   and/or under Section 301. There is a much broader question of whether -- which  
6   we discussed in November -- the WTO should somehow embrace competition  
7   policy and market access cases wouldn't need to have an outlet through Section  
8   301.

9           But to be very precise, this Section comment has only to do with  
10   the antitrust laws and is not a comment on Section 301.

11           MR. PROGER: Correct me if I'm wrong, but the Section has long  
12   held the policy or the belief that market access issues should be dealt with  
13   appropriately, where appropriate, under the trade laws and the antitrust laws  
14   should not be used as a club to gain what is essentially a trade issue, not a  
15   competition issue.

16           MR. VICTOR: Yeah, the antitrust laws are not a panacea for the  
17   market access issues.

18           DR. STERN: Okay.

19           MR. APPLEBAUM: And I might add that there is obviously a  
20   distinction between a private suit where a U.S. exporter alleges that it was  
21   improperly barred from access to a foreign market and a criminal case, such as  
22   the one Paul alluded to. If the Department of Justice has evidence that a group of  
23   foreign companies are engaging in such collusive activity, whether it's outbound

1 or inbound, that is a per se violation of the Sherman Act.

2 Most private litigation would fall into the category that footnote  
3 159 was concerned about, as the paper suggests, a lost export opportunity.

4 DR. STERN: Yes, that's helpful. I didn't want to pull this thing  
5 out of context. The paper is entitled "Report on the Use of Private Litigation."  
6 But you have suggested there may be a role for private litigation in 301.

7 MR. APPLEBAUM: No, I was not suggesting Section 301 as an  
8 alternative. Presently it's clear that the Sherman Act does apply to a claim of  
9 denied market access. There are, however, jurisdictional issues and there is the  
10 need to prove the violation.

11 DR. STERN: Yes.

12 MR. APPLEBAUM: But Section 301 is also available, and it may  
13 or may not be a competition-based claim. It may be simply a claim against the  
14 foreign government for taking certain steps which has nothing to do with private  
15 anticompetitive conduct. The Japanese film market case was a combination of  
16 both alleged governmental restraints, which is traditional Section 301, and also  
17 private conduct restraints, which is not traditional 301, and which could have  
18 possibly been the subject of a private antitrust suit.

19 I believe I testified in November, and others have said that, if  
20 Kodak had filed a private antitrust suit, it would likely have been met with a  
21 foreign sovereign compulsion defense, given Kodak's own view of the role of the  
22 Japanese government.

23 But there is always going to be, if someone wishes to pursue a

1 market access issue, considerations of a private antitrust suit or a complaint to  
2 the Department of Justice or a Section 301 action, or a combination thereof.  
3 They're not necessarily mutually exclusive.

4 MR. VICTOR: Or positive comity, under some of the agreements  
5 today.

6 MR. APPLEBAUM: Paul's right. Or one can go to the foreign  
7 government and ask that it bring a suit against the group alleged to be blocking  
8 market access by U.S. companies.

9 DR. STERN: Except when the government may be part of the  
10 allegation. Well, sometimes the right hand doesn't know what the left hand is  
11 doing. That's conceivable.

12 Are there any other questions for this panel?

13 MS. JANOW: Thank you so much.

14 DR. STERN: Okay.

15 MS. JANOW: You will have an opportunity to hear what the  
16 participants in that dispute feel about it later today if you wish to stay for it.

17 DR. STERN: That's right. That's a little bit of the reason why I  
18 wanted to get you back on record on this, Harvey, because we will be hearing  
19 more about this this afternoon.

20 Okay. Well, thank you again for all your hard work, and I'm sure  
21 we will be in further discussions. My request for fine-tuning your  
22 recommendations, particularly in the first paper, as it would relate just to the  
23 U.S. and the EU and the degree to which you think it would be constructive to

1 advance recommendations to enhance convergence, which as you said is already  
2 helping, would be extremely valuable.

3 Merit, did you want to say one other thing?

4 MS. JANOW: I wanted also to acknowledge that our interest is  
5 very high in the work that you mentioned was being developed and we will  
6 welcome that whenever it is ready. So thank you for that as well. I know they're  
7 not here today, but I know that there is real work going on. So thank you.

8 MR. APPLEBAUM: Thank you for having us.

9 DR. STERN: Okay. We will stand adjourned, or in recess I should  
10 say, until 1:00 o'clock, when we will begin session two, presentations by  
11 economists.

12 (Whereupon, at 11:53 a.m., the meeting was recessed, to reconvene  
13 the same day.)

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## AFTERNOON SESSION

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(1:13 p.m.)

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DR. STERN: We're coming back into order. And we are prepared now for session two, the presentations by the economists. We have before us several papers. I want to say personally how much I appreciate not only the work that went into it, but the fact that you've reproduced them so we can read them along as you make your presentations.

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This is the way it's shaping up: We're going to have four economists, and I think the way we've got it working is that Simon Evenett will kick off from the Brookings Institution, followed by David Salant, Len Waverman and Andrew Wechsler of Law and Economics Consulting Group. So fire away.

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MR. EVENETT: Thank you very much and thank you for the opportunity to come today. I know you were expecting Bob Litan and I'm going to be a very inferior substitute. Just please bear with me while I explain what Brookings has been up to.

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In cooperation with our colleagues with the Royal Institute of International Affairs in London, we've been engaged in a year long effort studying how transatlantic antitrust cooperation could be strengthened or should be strengthened. And we're looking in the areas of mergers, vertical restraints and cartels, and we also have a piece written on the extent of cooperation over

1 time.

2               This project will have a series of components. First there's a series  
3 of academic studies and there are a series of case studies, which I have  
4 distributed and submitted to the Advisory Committee. These case studies were  
5 commissioned by us and outline the key factual and substantive issues underlying  
6 fourteen transatlantic antitrust cases over the last three or four years. We're very  
7 grateful to some of the case study authors for putting these notes together for us.  
8 Since some of them are here, I definitely should say that. Thanks, Jim.

9               MR. RILL: You're welcome.

10              MR. EVENETT: Very grateful.

11              So the project was based on those materials, plus two conferences,  
12 one in London and one in Washington, and Bob Litan has also been advising us  
13 throughout the whole process.

14              But let's turn to what I think we're beginning to learn from this  
15 particular project, especially in the area of mergers and cooperation in merger  
16 enforcement between the United States and the European Union. Looking across  
17 the case studies and reviewing the academic literature, I think it's fair to say that  
18 it's been fairly well demonstrated that close cooperation is very feasible,  
19 extremely feasible, but it's by no means inevitable; and also it's not clear that  
20 cooperation is good in and of its own self. We should have some clear objectives  
21 in mind. And if it were the case that further cooperation meant adopting a  
22 standard which was inferior to the one that we have already, then that's by no  
23 means a good outcome.

1                   Now, I think in the case studies certainly in the merger area, of  
2 course the WorldCom/MCI case comes to mind as one where everything went  
3 swimmingly along, though there are a number of reasons for that which are well  
4 documented and well known. But I think, more importantly, we have to  
5 recognize that cooperation or successful cooperation is not inevitable and that  
6 there are going to be substantial difficulties which are likely to recur. Or another  
7 way of looking at this is nothing has happened which would stop these  
8 difficulties from recurring, and that's the key.

9                   What I'm going to try and develop here is that we should have far  
10 more pragmatic and seasoned expectations about what cooperation can deliver  
11 without major substantive changes and when we hit bumps in the road, like  
12 Boeing and McDonnell Douglas, we don't all go out screaming saying  
13 cooperation is over forever. And since we know that trouble is likely to come  
14 down the pike, we can inoculate ourselves against extreme reactions.

15                  I think the reason we should adopt this pragmatic approach is  
16 because we've seen in some cases that cooperation does have very beneficial  
17 effects in helping to reduce transaction costs, adding a little clarity to the  
18 purpose of, and reducing the uncertainty of, these investigations.

19                  But what are these impediments to cooperation? The first -- and  
20 this comes through in several of the cases -- is that often antitrust authorities are  
21 not the only authorities that are going to be reviewing cases. In the telecoms and  
22 transportation cases, this has come to the fore. And I think without obviously  
23 changes in laws in those areas, then we can expect these types of jurisdictional

1 fights to come up and we should be aware of that. And given that there are now  
2 so many mergers, or at least joint ventures, in telecoms and transportation, this is  
3 very, very important.

4           The second impediment are in views about what the role of the  
5 state is in market relations. This is particularly important in the EU. We now  
6 have the nomination of a new European Commission President, S  nor Prodi, and  
7 he has very clear designs about how he wants to reshape European industry.  
8 We've already had proposals floated in London and in Paris for consolidation of  
9 the European defense industry and this will not be the only industry where this is  
10 going to happen. I would expect you'll see a substantial amount of consolidation  
11 in the European side, driven not only by economic motives, often by political  
12 motives, too. And somehow we have to have a system which is robust to those  
13 types of changes. Looking forward, we will come across cases where it's going to  
14 be very striking that the U.S. and the EU have very different views about the role  
15 of the state in consolidating industries.

16           The third area are differences in analysis, and I guess here the  
17 primary example of this is on the so-called efficiency defense. I should point  
18 here that I'm drawing from the work of James Venit and William Kolasky, who  
19 wrote a paper for us in this project pointing to the differences to the U.S.  
20 approach to the efficiency defense, which is far more accommodating, to the  
21 European view, which is a lot more skeptical.

22           I should add that, having reviewed the academic literature myself  
23 and the industrial organization literature, there is very little evidence of

1 improvements in efficiency which result from mergers. Can two firms when they  
2 merge turn inputs into outputs more efficiently than the two separate entities?  
3 And the answer is there's not much evidence for that.

4               However, interestingly, there is finance literature now within  
5 economics, which points to the benefits of reductions in costs which result from  
6 mergers, particularly international mergers, and this involves reductions in  
7 shared fixed costs in advertising, distribution networks. So some of the claims  
8 which people have made about why you're seeing so many of these international  
9 mergers are beginning to filter through in the empirical literature, and the  
10 benefits seem to be not on the variable costs in the production technologies, but  
11 more in the advertising and overheads. How this literature evolves over time  
12 may well reinforce, undermine, or alter the way in which the efficiency defense  
13 is viewed by authorities, and if that particular literature is interpreted in  
14 different ways across the Atlantic we could run into some problems.

15              And finally, the area I think we can do something about is that in  
16 some cases we've seen the authorities receiving very, very different data sets and  
17 information to analyze and, unsurprisingly, coming up with very different  
18 conclusions. We have a case study by Gary Doernhoefer on the British Airways-  
19 American Airways case and he rams that point home.

20              So what do I take from these? Of the four impediments to  
21 cooperation, the jurisdictional questions and the difference in views of the role  
22 of the state are huge questions, which are unlikely to be changed by legislation in  
23 the next foreseeable future. And so we should expect them to occasionally

1 produce problems in antitrust cooperation. Again, the other impediment is  
2 contingent, in part, on the evolving academic debate over the efficiency defense.

3 But it does seem to us -- and this is very much a tentative  
4 proposition -- that one area where we could make some progress is in eliminating  
5 disagreements between merger and other authorities caused solely by the fact  
6 that they have different information. That seems to be perhaps an outcome you  
7 really want to avoid.

8 So we've been toying with a proposal which I will throw out for  
9 discussion. As I say, it's very tentative and we'd like to get your feedback. That  
10 is, perhaps it makes sense to have a separate track for merger investigations -- it  
11 would be recognized as a separate track -- and it would be optional. The parties  
12 could submit the Hart-Scott filing in the U.S. and an analogue to the Form CO,  
13 but maybe not as demanding as the CO form in the U.S., and they'd file the same  
14 information in the EU, assuring that the parties have the same information on day  
15 one. In return for that additional burden of supplying that information up front,  
16 there would be a presumption in the U.S., a presumption but not an obligation,  
17 that the second request filing would be a lot more selective and tailored to the  
18 specific questions at hand and not this broad encompassing affair that it is at the  
19 moment.

20 So the idea here would simply be to try and get the same  
21 information to the regulators on day one and, because it's an optional mechanism,  
22 both the authorities and the parties themselves could choose when to exercise it.  
23 And if it turns out that the U.S. authorities don't start narrowing down or

1 focusing their second requests, then the private sector will respond by not using  
2 this particular optional mechanism.

3 I think what it would mean for the EU and the U.S. is if they want  
4 to have a separate track for investigations where they want to have the  
5 information up front from day one, then they could encourage parties to go down  
6 this route and that quid pro quo would be established.

7 So why don't I stop there, since I've spoken for about 15 minutes,  
8 and I'd be delighted to answer any questions about the project. And if any of you  
9 need to contact me, I'm sure if I don't get to see you you can reach me through the  
10 staff here. Thank you.

11 DR. STERN: Thank you.

12 I think we're going to hear from the entire panel, because maybe  
13 they'll answer some of the questions which we have.

14 Okay. Len, are you going to start it off?

15 MR. WAVERMAN: Yes, I'm going to start off.

16 DR. STERN: Okay.

17 MR. WAVERMAN: I appreciate having the chance to come back  
18 for a second time after I was here in November and spoke generally about how  
19 standards setting can be a new cartel facilitating device. Today we would like to  
20 talk about a specific example -- the setting of standards for third generation  
21 mobile technology. So that's going to be a case study.

22 We're going to examine in detail, the European  
23 Telecommunications Standards Institute, or ETSI, which we feel is an institution

1 which favors the home team. That is, the way in which it comes to decisions and  
2 the way in which membership in that committee is allowed to, in a follow-up  
3 technology such as third generation mobile, which is a follow-up from second  
4 generation mobile, it allows incumbent equipment manufacturers in Europe  
5 basically to leapfrog into the third generation. And this can be to the detriment  
6 of consumers in Europe and worldwide and to the detriment of corporate  
7 manufacturers outside Europe.

8                   Therefore, we think that standard setting can be a cartel  
9 facilitating device and it can also stymie innovation. As a result, there's  
10 restricted market access. Because telecommunications equipment has network  
11 effects, that is there are both economies of scale and the desire to have the same  
12 type of equipment as others, if you can get a larger base initially you can tip the  
13 market such that everyone then jumps on your bandwagon, your standard  
14 bandwagon. This we think is a major potential problem for standard setting.

15                   I turn the my colleague, David.

16                   MR. SALANT: Thank you, Len. And thank you for the  
17 opportunity to speak here.

18                   I'm going to talk about the decisionmaking process for setting  
19 standards, briefly. Spectrum management decisions in Europe are fairly  
20 complicated and I'll just briefly go through the major players involved. The EC  
21 decides -- makes European-wide decisions now about spectrum allocation. So  
22 the EC has allocated some part of the radio frequency for UMTS or 3G spectrum.  
23 They've also delegated to ETSI decisions for setting the standards for how that

1 spectrum will be used.

2           There had been, and there still is to some extent, a battle between  
3 two main competing standards. One is called WCDMA; Ericsson has been the  
4 main proponent of that. The other one is called CDMA2000, and Qualcomm has  
5 been the main proponent of that standard. Qualcomm is the initial developer of  
6 CDMA and they own most of the intellectual property to CDMA, including the  
7 3G versions of it.

8           Just a couple of months ago there was an agreement for licensing  
9 CDMA intellectual property between Qualcomm and Ericsson, and Ericsson  
10 acquired a division of Qualcomm, but that has yet to settle the issue in a lot of  
11 ways.

12           Other entities involved include other SDO's, standards developing  
13 organizations, such as the TIA and ITU for setting standards. In the United  
14 States, the FCC allocates spectrum and assigns it, i.e., decides who gets to use  
15 the spectrum. They also traditionally decided the standards for spectrum in the  
16 United States, but it's less and less common for the FCC to make a standards  
17 decision. It's more and more common for the FCC to let the market decide. And  
18 so, for instance, in standard PCS cellular frequencies, there are three or four  
19 different standards being used and all of them basically work throughout the  
20 country. The FCC let the operators choose what standards to deploy.

21           Now, one other thing that's important in the EC is that the member  
22 countries retain a certain amount of discretion, and it's very unclear how much  
23 discretion they really have or are willing to exercise. So, for instance, the

1 Telecom Act that the EC passed this past year gave all the member countries  
2 some discretion in making some decisions based on public policy concerns in  
3 their countries.

4           To date, despite what I would view as fairly strong compelling  
5 arguments to allow the market to decide at least for some frequency bands, no EC  
6 country has deviated in the least from the single ETSI standard. And as things  
7 stand right now, the EC -- the individual countries that handle the actual process  
8 of allocating and assigning frequency rights are adhering to a single mode, a  
9 single path, and all applying one standard, mandating one standard.

10           So who are the players in the sense what firms will be affected, are  
11 affected and have an interest in this issue? Well, Qualcomm is clearly one of the  
12 leaders in the sense that they developed CDMA technology and that's the basis of  
13 both major standards. There are a number of equipment providers in Europe who  
14 so far have dominated European supply of infrastructure equipment and most  
15 other equipment, and Ericsson and Nokia are two of the leaders, and they also  
16 have a significant presence at ETSI.

17           There are large number of U.S. equipment suppliers whose  
18 prospects for doing business in Europe are clearly affected by the standards. I  
19 believe that Lucent is probably the leading U.S. equipment supplier. And then  
20 the operators, those firms that provide wireless telecommunication services

21           In Europe the only digital service used for voice is GSM. There's  
22 one standard and that standard is available here in Washington and in most of the  
23 United States, but it's probably the least available standard in the United States.

1 It also tends to have the highest rates. But if you want a hand set that you can  
2 take to Europe, you have to buy GSM. You can't buy Sprint, you can't buy  
3 AT&T, you can't buy Bell Atlantic, you can't buy U.S. West or Airtouch. They  
4 don't have GSM technology.

5               So the American operators will be affected, and I just listed briefly  
6 who the major American operators are and what their technology choices are.  
7 Sprint, Bell Atlantic, Airtouch, U.S. West, operate CDMA. AT&T operates only  
8 TDMA. Bell South and SBC operate both TDMA and GSM, and Pac Bell and  
9 Omnipoint operate GSM. So there's going to be a differential, a discriminatory  
10 impact based on what happens in the development of these standards.

11               My colleague Drew Wechsler -- Len. Sorry.

12               MR. WAVERMAN: The slides are slightly out of order from the  
13 ones we gave earlier.

14               As David has shown, there is clearly competition between  
15 technologies. What we want to look at now is the European Telecommunications  
16 Standards Institute, ETSI, which was founded in 1988. It has a similar makeup, a  
17 similar way of forming consensus, to other European institutions, which is  
18 weighted voting. Voting is based on European Union turnover and the weighted  
19 voting was institutionalized in 1988 in order to prevent hold-ups by small  
20 member states or small companies.

21               However, if you don't have EU turnover you can still become a  
22 member of ETSI, but you only get one vote. There is a 71 percent rule for  
23 consensus. You need 71 percent for consensus.

1                   Now, to become a member of ETSI you have to agree to uphold the  
2 ETSI standard. You have to support a common position at the ITU and you have  
3 to "make use of the standards proposed by ETSI." Now if you're a competitor to  
4 technology in Europe, for example GSM, which as we'll see in a moment is  
5 manufactured mainly by Ericsson, Nokia and Motorola, if you're a company like  
6 Qualcomm, which does not produce GSM technology and whose present  
7 technology for second generation mobile is not accepted in Europe, so the second  
8 generation, I-95 standard, is not an accepted standard in Europe and so  
9 Qualcomm has no European turnover.

10                  Therefore you then have a division between insiders and outsiders.  
11 This is what we're leading to in terms of the way this institutional design can  
12 facilitate cartels.

13                  Now, in addition to ETSI coming up and making a decision on a  
14 voluntary standard, there's also a process which is unusual from a North  
15 American perspective, which is the European Union can then vote and make a  
16 standard from ETSI or from other organizations in things outside  
17 telecommunications something called a European norm. A European norm  
18 becomes a mandatory standard across Europe.

19                  So you have here I think a double problem. The first problem is  
20 within ETSI, and we'll show that in a second. But even without this government  
21 mandating, the process within ETSI needs redesign. But added on top of that is  
22 the ability of an ETSI standard to then become mandatory across Europe and  
23 where all work on standards not the European norm must be stopped. That is in

1 the European legislation. You cannot work on a standard which is outside the  
2 European norm.

3           Within ETSI there's something called the special mobile group,  
4 SMG, which is the group, the subcommittee, which is responsible for designing  
5 the standard for third generation. That is also the subcommittee that is  
6 responsible for the GSM specification or the second generation specifications.  
7 So this committee, then, moves from second generation to third generation.

8           We argue that it is in fact run by manufacturers and not by telcos.  
9 There's basically something like 1700 votes at ETSI based on turnover.  
10 Manufacturers have 414 of those votes. But the telecom revolution is not done  
11 by telecom operators. It's done by equipment manufacturers. It's equipment  
12 which makes telecommunications -- the telecommunications revolution. It's the  
13 switches and the hand sets for mobile, which no telecom operator manufactures,  
14 and they have very little information or knowledge about advances in technology.

15           And they rely on equipment manufacturers. They rely on them for  
16 their existing equipment and for the next generation.

17           Of the 414 manufacturers' votes at ETSI, four firms -- Alcatel,  
18 Ericsson, Siemens and Nokia -- have 60 percent of those votes.

19           Ericsson has something like 68 votes, Nokia has 47. Again, U.S.  
20 manufacturers who are not in Europe if they join ETSI get one vote. Qualcomm  
21 has one vote, so it has two tenths of one percent of the voting power.

22           European manufacturers also dominate mobile equipment sales at  
23 the moment. In 1998, the European manufacturers had 63 percent of all mobile

1 equipment sales in the world. And Ericsson and Nokia depend on mobile  
2 equipment for their livelihood. They're much more concentrated in mobile sales  
3 than other firms. 72 percent of Ericsson's revenues come from mobile equipment  
4 and 89 percent of Nokia revenue comes from mobile equipment.

5               The way that the special mobile group works is that the  
6 subcommittees under this committee which look at the specific technologies, the  
7 key positions in those subcommittees tend to go to equipment manufacturers.  
8 And these subcommittees -- these individuals on subcommittees get to design the  
9 agenda. So there is an ability, then, for a few firms to basically dominate the  
10 special mobile group. 10 percent of SC members have 71 percent of the votes  
11 and 15 members can block anything.

12               David, back to you.

13               MR. SALANT: Okay. Well, as I mentioned, a couple of months  
14 ago Qualcomm and Ericsson signed an agreement, and I'll give you a brief recap  
15 of what's in that agreement. There are two standards, WCDMA and CDMA2000. I  
16 think several dissertations in EE will be written on these standards and it's fairly  
17 hard to understand all the engineering specifications. But my impression, from  
18 what I understand in terms of the development of the standards, is that the  
19 CDMA2000 was on the table at ETSI discussions. Ericsson went back and made  
20 what seemed to be a number of inessential changes in the technology that made  
21 the existing basic software that Qualcomm had developed largely obsolete,  
22 adversely affecting Qualcomm and other U.S. manufacturers of CDMA  
23 technology. Then ETSI selected WCDMA.

1                   That has triggered some controversy, I'm sure you're all aware.

2   And the agreement basically provided for a three-mode standard, so basically this  
3   is an agreement to disagree or to split the baby. So the operators -- anybody  
4   deploying the 3G standard would be able to use WCDMA, CDMA2000 or another  
5   standard called TDCMA. And TD/CDMA is for mainly different type of  
6   applications, for indoor use let's say, and not from mobile use.

7                   So the two mobile components of the standard are WCDMA and  
8   CDMA2000. They're still competing. What basically the Ericsson-Qualcomm  
9   agreement sanctioned, ratified, is that it's okay for anybody to deploy either one  
10   in Europe, nobody would object. But the way that they're supposed to be  
11   implemented is that everybody should produce multi-mode handsets, hand sets  
12   that work with both standards.

13                  That doesn't really happen in the United States, where we have four  
14   standards, an old analog standard and three digital standards. The only  
15   multimode hand sets that we have and the U.S. are between the old analog and  
16   each of the individual digital. So there's CDMA-analog, TDMA-analog, and  
17   GSM-analog hand sets.

18                  So it's not clear how this standard, this agreement will work out.  
19   Also, in Europe it seems quite clear that, well, it's still the case that WCDMA is  
20   still the only ETSI-approved standard, so all the European-based technologies  
21   and operators using GSM European-based technology in the United States and  
22   elsewhere will be able to roam with their equipment much more easily than the  
23   ones using North American standards. So that can have a discriminatory impact

1 on European operators or European-friendly operators outside of Europe.

2           The agreement also has a licensing arrangement agreement  
3 whereby Qualcomm will license rights to intellectual property to Ericsson. There  
4 is some exchange that Ericsson will license, apparently, some intellectual  
5 property to Qualcomm. Ericsson has announced it will not sell CDMA2000  
6 infrastructure in Europe, it has no plans to deploy it.

7           The agreement does call for Ericsson to back CDMA2000 at ETSI,  
8 but nothing's happened yet.

9           Next slide, please.

10           This slide is meant to put a little bit of perspective on the market  
11 dynamics. This is a very rapidly changing industry, and there's these terms, 2G  
12 and 3G. 2G is used to refer to the first digital standard for wireless cellular and  
13 PCS communications. It replaced the analog, which is the 1G.

14           3G is supposed to be a more advanced version of 2G services, and  
15 the EC has mandated certain performance criteria that any 3G systems must meet.  
16 However, nobody really knows what 3G will be in practice. These are new  
17 standards, these are new technologies. Even though the EC has mandated certain  
18 performance criteria, the fact that they mandated high-speed wireless Internet  
19 access doesn't mean everybody will get very much of it. All it means is you'll  
20 have voice and some data capability.

21           So really nobody knows much about the product mix that will be  
22 provided and offered with this new technologies and the new bands.

23           Most of the EC countries have now started the process of

1 allocating spectrum for UMTS. They're starting -- UK has I think the third draft  
2 of spectrum auction rules that they just issued a week or two ago. Their  
3 timetable has slipped a bit, but they really want to run an auction of 3G spectrum  
4 at the end of this year or probably now early next year. They had been mandating  
5 ETSI standards, which means now WCDMA.

6           One of the reasons there's so much pressure in Europe is that  
7 there's congestion. Spectrum's gotten very crowded and the operators want more  
8 spectrum. One approach is to use more spectrum, which is what's happened in  
9 the United States. But the Europeans haven't really considered very much what  
10 we call refarming. So in the United States, every cellular operator who had  
11 analog technologies converted to digital. That's not really being considered very  
12 much in Europe. In some places it's not allowed.

13           For instance, Qualcomm has a GSM/CDMA technology which  
14 takes the existing infrastructure and adds a more efficient technology on the  
15 existing infrastructure. That as far as I can see has no ghost of being approved  
16 by ETSI or being deployed or even considered.

17           What's gone on in the U.S. is a bit different. The FCC has issued a  
18 notice of inquiry. The FCC is not nearly as far advanced. The Europeans might  
19 offer that the U.S. is not as well organized and will be lagging behind again. Of  
20 course our rates are maybe a little bit lower than theirs, so there's an issue about  
21 whether we should have mandated standards at all.

22           The U.S. -- there's some conflict between the U.S. bands and the  
23 European bands. However, the FCC typically facilitates refarming and the

1 business case really encourages it. The operators who have the license to the  
2 spectrum decide when it's appropriate to introduce the technology. It's not  
3 decided by regulators. Regulators aren't required to make lots of detailed  
4 analyses of when it's the right time to introduce the new technology for the  
5 public.

6                   That's not the European approach. The European approach  
7 mandates and, I would argue, overspecifies standards.

8                   The fourth and fifth checks on the right-hand side deal with the  
9 new data rates, new wireless data technologies. There are various versions of  
10 these new wireless data technologies that are being developed. If you go to the  
11 web sites, you see the usual publicity items saying there are plans to deploy them  
12 even as early as this year.

13                   Now, this CDMA IS-95- HDR -- "HDR" is for "high data rate" --  
14 offers, the promise is as high as 2.5 megabits per second, which is higher than  
15 you get with a cable modem. It's higher than a digital subscriber line, DSL.  
16 That's what they think they can eventually get with wireless technology using  
17 existing PCS bands or using these new 3G or UMTS bands.

18                   That cannot be approved in Europe. I know of companies that have  
19 interest in looking into that, but there's a major regulatory hurdle. Right now  
20 ETSI has no provision to even to consider that.

21                   There is a European standard called EDGE which may be better,  
22 may not be as good, may be more compatible than GSM, but who knows. That  
23 apparently is getting some consideration and I'm not fully up to speed on how far

1 that has progressed. If you go to some, like Ericsson's web site, you will see  
2 some specifications on EDGE.

3 Drew?

4 MR. WECHSLER: Thank you very much.

5 Well, where do we stand? Len mentioned earlier the ETSI  
6 transition over the last decade. What a difference a decade makes. In 1988 there  
7 were no incumbents in mobile, and there was possibly a reasonable case for  
8 weighted voting to create scale across the very small markets of Europe.

9 Now in 1998, the situation is completely different. Incumbents are  
10 well-established and standards, instead of the market, are creating powerless  
11 outsiders. Who are these outsiders? Well, they're the non-incumbents, those like  
12 Qualcomm who have no EU turnover and have just one vote, one rather  
13 meaningless vote, for which they have to accede to conditions that are hardly  
14 acceptable. And the outsider is also new technologies which can be stopped by  
15 the European norm system without the test of competition on the merits.

16 The outcome, if you look at who uses the technology and who has  
17 the votes in ETSI, is WCDMA technology without any market test of that as  
18 opposed to its alternatives.

19 We had a similar result -- I think the committee asked us last time  
20 about Geotek, which is spelled wrong on the slide there; it has a k" -- a similar  
21 result in SMR, where U.S. technology and Geotek were frozen out of Europe.

22 So what we're seeing here that bad competition policy can make the  
23 full transition into bad trade policy. We have EU market access foreclosed by a

1 standard setting process that isn't -- whose logic was dictated by 1988 conditions,  
2 not the present. And this becomes a competition for both the European Union  
3 and its member states if they choose to pursue it.

4           The EU market, which roughly speaking is perhaps one-third of the  
5 world -- one-third would be North America and one-third loosely speaking  
6 everything else -- that market is large enough to tip other markets. People are  
7 afraid of adopting standards and buying equipment and winding up stranded as  
8 the rest of the world changes.

9           Even more crucial in fast changing technology is that, given the  
10 voting standard and the way new standards are set, existing market power  
11 determines follow-on technologies without market tests. This thwarts  
12 competition on the merits and allows the international leveraging of market  
13 power from Europe to elsewhere in the world, further disadvantaging any U.S.  
14 providers who have chosen a different standard.

15           This distortion undermines trade in goods and services,  
16 international investment, and the national treatment of various providers. Of  
17 course, it will also thwart or slow technological progress to everyone's detriment,  
18 including the EU's.

19           So what are the goals that we would propose that ICPAC support  
20 on standards issues? We need standards for the standard makers, the standard  
21 setters. We need a very general notion of what is appropriate for them to do and  
22 what is not appropriate for them to do. The most basic notion is that standard  
23 setters should not replace market tests to determine the best technology.

1                   We have to work towards limiting or stopping regulatory capture  
2 by incumbents, which is exactly how ETSI has evolved over the last 10 years.  
3 We need to remove a weighted voting standard that favors incumbents. The case  
4 for weighted voting, if there ever were one, certainly no longer exists now that  
5 mobile telephony is an established fact.

6                   We need to foster the free development of technology and defend  
7 international competition on the merits. And to do that, I would suggest that the  
8 United States has a very good model -- the promotion of voluntary standards and  
9 competition among alternative technologies. That is our model and we can  
10 discuss the costs and benefits of that model. But for a rapidly changing  
11 technology, it provides a superior approach.

12                  ICPAC should support remedies for what is turning out to be a  
13 costly situation, from both the standpoints of welfare economics and of  
14 competitors who want equitable treatment and have a right to expect it. A  
15 minimum requirement would be attention to the issues of international market  
16 tipping and market access that are implicit in certain kinds of standard setting  
17 schemes.

18                  We note that 2G is still very much around; it has not been  
19 completely replaced yet. Therefore, not only are 3G standards important, but 2G  
20 licensing is also an ongoing issue.

21                  We endorse the idea of working towards antitrust examination of  
22 these kinds of issues in both the EU and the United States. All governmental  
23 authorities share the same interest here. The only reason ultimately why the EU

1 would do differently is if Europe decides implicitly to go back to picking winners  
2 and installing an industrial policy. No one explicitly acknowledges such goals  
3 any more, but they appear implicit in the pattern we are watching unfold.

4 More specifically, we believe that DG-IV should take a hard look  
5 at new rules. Perhaps it would be appropriate to develop a memorandum of  
6 understanding between the Department of Justice and DG-IV to foster more  
7 international comity on how to proceed.

8 And finally, while we do not suggest that it is appropriate to do so  
9 tomorrow, the issue we have been discussing appears to be large enough to  
10 warrant consideration for a separate future WTO agreement on standards setting.  
11 It is easy to imagine that this may become necessary as the issue grows to include  
12 more than just telephony.

13 Thank you.

14 DR. STERN: Thank you very much for that very thorough update  
15 of what has become an interesting case. It raises more general concerns and  
16 considerations relating to competition policy from standards setting.

17 I'd like to now to open up the time for questions, comments. Jim?

18 MR. RILL: Let me ask Simon. You indicated that we should start  
19 out with basic expectancies when we get into international cooperation. Most of  
20 your case studies focus on merger cooperation. What would you suggest on the  
21 basis of your case studies are the appropriate expectancies that should underpin  
22 our recommendations with respect to trade and competition or market access  
23 issues?

1 MR. EVENETT: A narrow question.

2 As you know, the trade and competition policy literature is  
3 voluminous. I would feel very reluctant at the minute to give you any specific  
4 recommendations. From what we've seen in these case studies, I guess one  
5 question I have is how big are these international spillovers that people talk  
6 about, and if you don't think -- I mean, one question when I read these case  
7 studies, I keep asking myself how big are these spillovers?

8 And if you don't think that they're that big, then that really  
9 undermines a lot of the case for coordination and cooperation. But that's a  
10 conjecture based on these case studies, which I mean I'd have to explore them  
11 much more carefully. I'm sorry to give you an unsatisfactory answer, but that's  
12 my sense.

13 MR. RILL: There is no unsatisfactory or satisfactory answer.

14 MR. EVENETT: My sense reading these case studies is that these  
15 so-called spillovers and their implied rationale for cooperation is much smaller  
16 than we've thought. But that's a conjecture.

17 DR. STERN: Merit?

18 MS. JANOW: I thought this was a fascinating presentation and I  
19 thank you so much. I have no personal sense of how this same presentation,  
20 which I'm sure you've presented in Europe, might be received in other audiences  
21 and I'd be very curious how you think -- when you give this presentation, if the  
22 European dominance is noted approvingly or is seen as problematic by would-be  
23 smaller entrants, because if subsidiaries are in effect aggregated for purposes of

1 voting, it also means they can lose their voice on issues in that deliberative  
2 process.

3           Also when you talk about an expanded U.S. DOJ- DG-IV  
4 arrangement, are you thinking specifically with respect to standards setting  
5 bodies or was it a broader representation?

6           Finally, we do have the technical barriers to trade within the WTO  
7 that were set up in part because of the standards experience in other  
8 environments, and why wouldn't one challenge these practices, if they're  
9 discriminatory in effect if not intent, under current structures?

10           Sorry, that's a mouthful.

11           MR. WAVERMAN: Maybe I can begin and then my colleagues  
12 will probably have more about the trade barriers.

13           In Europe generally, the perception is that they have done well by  
14 GSM and the U.S. in mobile is really a basket case -- this has been a great  
15 example of European cooperation and that setting a single standard, in fact, is  
16 something that is of great benefit to Europe.

17           Bob Crandall and Jerry Hausman are trying to examine that  
18 argument. The problem, of course, is when you examine that argument. If you  
19 examined that argument four years ago I think they were probably correct,  
20 because they were able with one phone to roam across Europe and there were  
21 economies of scale in production of phones, so costs were falling. And the U.S.  
22 had competing standards. I can remember when I first used a mobile phone going  
23 across California were four different standards. It was terrible. Four different

1 standards. Thank you.

2 But now, the GSM is so dominant in Europe, it's very hard to move  
3 to the next round of competition between technologies. And really, I think in  
4 these high-tech industries the competition between technologies is innovation,  
5 which in the longer run is really what drives prices way lower.

6 If the U.S. had been in the same position as GSM, had a single  
7 GSM standard, CDMA would not exist anywhere in the world. CDMA was  
8 developed in the U.S. and able to be put in place because in a sense there was no  
9 standard. Standards were voluntary. If you could get an operator to use that  
10 technology, then you could sell the equipment. In Europe, even if there was a  
11 company wanting to use CDMA, they couldn't because it was frozen out.

12 So you would not have had the innovation of CDMA. I think now  
13 if you look across the U.S. and look at these one-rate plans where you get 1200  
14 minutes for 100 dollars, which is falling, and there's no distinction between local  
15 and long distance prices, 10 cents or 8 cents a minute, these prices are well below  
16 any prices in Europe.

17 So I think today if you did a comparison between the competition  
18 in the U.S. and the competition in Europe, which I don't think Europeans  
19 understand, you find that there are much lower prices in the U.S. and there's  
20 vibrant competition between the technologies.

21 Now, Europeans keep -- and I teach in London Business School  
22 now and I'm a French citizen, so I can say this with my European -- and a  
23 Canadian citizen -- I can say this -- half of me speaks as a European. The other

1 half is an economist.

2 (Laughter.)

3 DR. STERN: True conflict. I don't get the fractions here.

4 MR. WAVERMAN: The Europeans still, even when they look at  
5 third generation, they say we want to have roaming, we want to have the same  
6 phone anywhere in Europe. But what I think they're misunderstanding is the  
7 difference between roaming and interconnection. That is, we could take our  
8 present TDMA, U.S. TDMA phones to Europe, if there was one operator in a  
9 country that had that technology. You don't need every operator with that  
10 technology.

11 For example, in the U.S. from a TDMA phone you speak to  
12 someone on a GSM phone because there's interconnection. For roaming you need  
13 a single operator with that technology. You don't need every operator with that  
14 technology. I think that's the fundamental thing that they don't understand in  
15 Europe, is that the competition -- you can have multiple technologies and it's  
16 competition between technologies.

17 MR. WECHSLER: There is an often obscured tradeoff between a  
18 static and a dynamic analysis. When the pace of change is sufficiently rapid, the  
19 cost of making a choice based on a static view -- e.g., we want one market now --  
20 rise. If that choice is made and outmoded within several years, the consequence  
21 may wed a significant market semipermanently to a backward technology. The  
22 dynamic costs would then outweigh the short-run static benefits.

23 We are not here touting a particular technology. What we are

1   touting, and what we think ICPAC is all about, is competition on the merits. The  
2   standard response, one presumes, is based on this notion that there would be  
3   chaos and stranded units if for instance, Luxembourg went with one system and  
4   another country chose another.

5               What we are suggesting is twofold. Professor Waverman suggested  
6   that confining competition to exist within one technology is not necessarily the  
7   consumer's best interest. The consumer's best interest lies in robust competition  
8   that can be provided across technologies so long as there is one provider of each  
9   everywhere. Then the market gets to play out the decision.

10              There is another aspect of stranding: the United States now has a  
11   plethora of different technology phones, and consumers undertaking new cellular  
12   purchases are subjected to great confusion if they're not technogeeks. Most  
13   consumers consider options, but then ask themselves the question: What is the  
14   difference?

15              A new cellular phone is but a freebie with two years of service.  
16   Thus, consumers are not actually stranded. If a consumer changes plans after two  
17   years, a new phone is obtained at a low price, and the older phone is thrown  
18   away. It is outmoded technology.

19              Well, there are many interconnection issues, but the pace of change  
20   has changed. Dynamic factors reduce dramatically the incentive to enforce a  
21   single standard on the market.

22              MR. SALANT: Let me add a little bit about the European view.  
23   First of all, I've heard from European operators and I've got the impression,

1 although somewhat tacit, from European regulators that if American companies  
2 aren't able to enter Europe, well, that's not necessarily bad, and so if there's a  
3 European standard they'd much rather have a European standard winning with  
4 European manufacturers than having an open competition.

5           It seems fairly clear that there's a lot of that sentiment and  
6 European operators like a PTT for whatever, BT, FT, DT, ET, FT, whatever T,  
7 they shouldn't care about technologies. They should only care about what  
8 technology provides the best service to their customers. But it's quite clear from  
9 what I've seen talking with people at various PTT's is that they feel somewhat  
10 obliged to adhere to a European solution.

11           Another issue on DG-IV versus DOJ. One of the complicating  
12 factors here, it is not that there's just DOJ and the DG-IV. It's not purely  
13 competition policy agencies being involved. And this reminds me of some of the  
14 tension that happened within the FCC when they went to a market approach for  
15 managing spectrum. There was a tension between the engineers and the  
16 economists and, for once, the economists seemed to have something that was  
17 viewed as being positive.

18           And DG-13 is the telecom director general and they had carried the  
19 day on 3G, and DG-IV has stayed out of the 3G battle. And so in some sense, to  
20 sort of close the loop, you need -- discussion needs to be more inclusive to  
21 include the FCC, DG-13 coordinating with DG-IV and the FCC and DOJ in a  
22 more open way where all the issues get discussed.

23           DR. STERN: That's very helpful. I really did want to bring your

1 presentation back into the framework of our Committee's work, and you've done a  
2 very good job just at the very end by making that point.

3 I sit here and I'm thinking about what you're saying, and I wrote to  
4 myself "Industrial policy or technology policy trumps competition policy" in the  
5 way you've described the situation in Europe. Last week I was listening to the  
6 discussions in the context of some new policies that are being developed within  
7 the European Union called the precautionary principles, which have to do with  
8 science or when you don't have science. One could suggest that there you've got  
9 politics trumping science or technology.

10 So these balances are very, very important, and the role of the  
11 government from the point of view of enhancing competition and not letting  
12 things be closed down either in the name of industrial policy or environmental  
13 concerns or non-scientific basis -- in this case this is science, but there's yet  
14 again another consideration, industrial policy, that has been inserted.

15 So this question is extremely important, I think, ultimately, in how  
16 we define our mission going forward with new technologies and new products.  
17 In the United States we're tackling it one way, and the EU may be tackling some  
18 of these another way.

19 Earlier this morning we talked about cultural difference between us  
20 in terms of litigation and the role of litigation. But here's another cultural  
21 difference, and we have to be very conscious of it as we design recommendations  
22 for trying to harmonize or converge.

23 MR. WECHSLER: What you see here is not so much a cultural as

1 an historical difference with a sympathetic interpretation. Europe is slogging  
2 through the creation of institutions to support a single market. In essence, they  
3 are engaged at the analog of our Constitutional Convention. As the EC tries to  
4 replace in mutually advantageous places separate national bureaucracies, the  
5 constituent governments attempt to do what the preceding bureaucracies have  
6 done on an EC-wide basis.

7 But all over the world, there is now a major trend towards  
8 deregulation with market rules that encourage the actors to engage in socially  
9 beneficial outcomes, with the market determining the outcome rather than the  
10 regulators. The EC can in essence leapfrog. Rather than simply imitating  
11 old-style regulation and government directive at the member state level, the EU  
12 can build Europe-wide a new model of regulation now being built everywhere  
13 else.

14 DR. STERN: Right.

15 May I ask if you would tell us what your timetable is for finishing  
16 your report?

17 MR. EVENETT: Finishing the Brookings study?

18 DR. STERN: Yes.

19 MR. EVENETT: We hope to have a draft ready by the end of June.  
20 Our chapters authors are getting the materials to us by the end of this month.

21 DR. STERN: And the recommendations that you were talking  
22 about, including this two-track recommendation?

23 MR. EVENETT: Yes, absolutely, and that can be written up

1   sooner, actually, if you would prefer it.

2                   DR. STERN: I think Merit is shaking her head, and I agree. We  
3   would like very much. You ask us for our input. We want your input.

4                   MR. EVENETT: Okay, I'll get that to you.

5                   DR. STERN: I think we would like that very, very much,  
6   particularly when it comes to the recommendations, including the fact that I see  
7   you're a little more discouraged that you were in the very beginning as to the  
8   applicability of what these case studies will mean.

9                   MR. EVENETT: Well, I think it's more -- I think if you're trying to  
10   come up with a rationale for cooperation, one has to find ways in which my  
11   welfare affects you and your welfare affects me. And if the spillovers aren't too  
12   large, then we can go along on our own way. That's one thing.

13                  The other observation is, do you really want to try to perfect your  
14   own national law before you decide to set up an international standard, which is a  
15   big question? Or do you want to risk locking in the wrong international  
16   standard? And I think my other panelists here have talked about what happened,  
17   what can be the detrimental consequences of locking in the wrong standards.

18                  DR. STERN: I hope that your study, since you talked about it as a  
19   transatlantic antitrust cooperation --

20                  MR. EVENETT: Right.

21                  DR. STERN: -- that you're going to be looking at it not only from  
22   an international standard, but a transatlantic standard.

23                  MR. EVENETT: Sure.

1 DR. STERN: You are going to be narrowing your scope.

2 MR. EVENETT: Yes -- sorry.

3 DR. STERN: Go ahead, I'm sorry.

4 MR. EVENETT: Yes, when we devised this particular project we  
5 spoke to many of the experts in town, and there was a desire for a focus on the  
6 transatlantic issues. When we started doing this, we faced the debris of the  
7 Boeing-McDonnell Douglas case, which was still on peoples minds. And I think  
8 the a substantial number of transatlantic transactions really reinforces the  
9 importance of this issue.

10 DR. STERN: Absolutely. We have both the U.S. and the EU  
11 engaged in this Transatlantic Economic Partnership, where competition policy  
12 has been noted. We'll just see how deep and far they do go. But to the extent to  
13 which they are informed by your work, I think it will be extremely helpful.

14 I just had one comment and then I think we have to close this  
15 panel. Your observations based on these different transactions that you  
16 examined about efficiency. That observation is one that I share based on my  
17 experience sitting on a number of corporate boards. There are efficiencies, but it  
18 is not so much in manufacturing. You don't see necessarily a manufacturing  
19 plant in one country being closed in the name of efficiency, but you do see the  
20 back offices being really reduced, everything from information systems to -- you  
21 mentioned advertising. But there's a whole variety of services that make up  
22 where you do see these efficiencies, and in many cases they are much more costly  
23 than the manufacturing of the output of the goods. And of course many of them

1 are just service industries to start with.

2 I want to thank this group and now just move on to the second  
3 panel, which is a presentation from representatives of U.S. businesses. We have  
4 panelists representing Eastman Kodak, Guardian Industries, and the United  
5 Parcel Service. I note that there is some overlap between some of the panels, so  
6 we don't have to bid adieu to everyone. We can get questions, another shot at  
7 some of the panelists.

8 (Pause.)

9 DR. STERN: Chris, you've been very patient. This will be the last  
10 panel, and we appreciate everybody's attendance and we're prepared to hear you.

11 MR. PADILLA: Thank you very much for inviting us. I want to  
12 also introduce my colleague from Kodak, Patrick Sheller, sitting in the front row.  
13 He's our chief antitrust counsel and particularly knowledgeable about the  
14 subjects I'm going to discuss.

15 The Film case or, as some have called it, the Kodak-Fuji case has  
16 become the poster child for discussions about trade and competition policy,  
17 including a great deal of discussion before this Committee. And we thought we  
18 would appear today to give our view, having been through this experience, of  
19 what the lessons are to be learned from the experience of the Film case going  
20 forward.

21 I would say that there have been two sort of camps that have drawn  
22 broad lessons from what happened in the WTO case on film. One, primarily  
23 trade experts, and particularly academics, have concluded that the answer from

1 the result of what happened in the Film case is that the mandate of the WTO  
2 needs to be broadened to cover competition policy, that if only the WTO had the  
3 mandate to cover competition policy matters, the case might have been decided  
4 differently and a blow might have been struck for U.S. market access in Japan.

5 Another camp, and I would say a great number of antitrust  
6 attorneys fall into this category, who say, well, the answer is this shows once and  
7 for all that you shouldn't mix competition policy with the WTO; we should not  
8 have a competition policy covered in the next round of WTO negotiations, and in  
9 fact we should rely on positive comity in order to accomplish results.

10 We think both camps are wrong, and we would like to discuss why  
11 and perhaps suggest a third way for this very unique problem.

12 Our experience with the U.S. authorities and before the WTO, we  
13 think, demonstrates convincingly the current system we have for dealing with  
14 problems where trade and competition issues are mixed is a fundamentally  
15 flawed system and must be fixed. In our case, Kodak presented what we  
16 considered to be and what many outside experts consider to be very strong proof  
17 of anticompetitive practices in Japan that had effectively blocked Kodak's ability  
18 to sell film and other consumer products in that market.

19 These barriers consisted of unlawful restraints existing at the  
20 manufacturing, distribution, and retail levels, restraints which were both  
21 condoned and in fact encouraged by the Japanese government, including the  
22 Japanese competition enforcement authority, the JFTC. These restraints created  
23 an impenetrable barrier to meaningful market access. Kodak's film market share

1 is and has been slightly less than 10 percent for the last 25 years despite our  
2 substantial investments in and pricing in the market.

3           Because the U.S. Government today lacks a cohesive and logical  
4 approach to dealing with trade and competition matters, when we brought our  
5 case to U.S. authorities initially in 1995, the response was that the case was  
6 broken up into a number of disparate pieces.

7           There was one piece which was a GATT complaint brought by the  
8 USTR to the WTO, commonly known as the film case. This GATT case was  
9 stripped of all references to private restraints of trade and consisted solely of  
10 actions taken by the Japanese government.

11           There was a second complaint against the Japanese large store law,  
12 in which a case was actually prepared to be filed under the General Agreement on  
13 Trade and Services, but was never filed due to doubts on our part as well USTR's  
14 about the WTO's ability to manage complex sets of facts, particularly regarding  
15 Japan.

16           And finally, there was a submission of evidence by Kodak of  
17 private anticompetitive practices to the JFTC, evidence which was ignored for  
18 two years until after the case at the WTO had been settled, and I'll talk more  
19 about that in a moment.

20           Not surprisingly, the dispersal of the case into many different  
21 components led to disappointing and fragmented results. As everyone knows, in  
22 December of 1997 the WTO rejected all 21 of USTR's assertions concerning the  
23 participation of Japanese government authorities in anticompetitive film industry

1 practices.

2 Japan did eventually phase out its large store law, but it is now in  
3 the process of replacing that law with local measures similarly designed to  
4 constrain large retailers. And the JFTC has issued some warnings to private  
5 parties that were engaged in restrictive practices, but took no corrective or  
6 punitive action and has not investigated evidence of price fixing.

7 From Kodak's perspective, this demonstrates the need for a better  
8 approach. As I've mentioned, there have been two camps who have drawn lessons  
9 from our experience and let me discuss why we think both of them are mistaken.

10 First, and this is by far the majority camp, I would say, casual  
11 observers and trade experts have concluded that the answer to the problem is to  
12 expand the mandate of the WTO. This in particular has been the conclusion  
13 drawn by the European Union, which, not coincidentally, participated in the case  
14 on the side of the United States.

15 We believe that the film market access result showed that the WTO  
16 is not competent to review allegations of collusion between foreign governments  
17 and private industry, let alone purely private anticompetitive practices. Those  
18 who have drawn this lesson I think perhaps haven't read what the WTO found in  
19 the Film case. The WTO panel did not say that there was evidence of private or  
20 government-to-private collusive behavior and that they simply couldn't reach it.  
21 Rather, they said they couldn't see it at all.

22 They acknowledged that there was the existence of 30 years, on  
23 one hand, 30 years of Japanese government industrial policies designed to

1 promote Japanese film makers. And they acknowledged on the other side that  
2 there was a situation in which competitive outcomes in the market showed Kodak  
3 could not break the barrier of about 9 or 10 percent. They could not find any  
4 causal connection between those two things.

5               Now, I would suggest to you that if the WTO cannot come to grips  
6 with the existence of collusion between government and industry in Japan,  
7 cooperation, industrial policy, and so forth, which is extensively well-  
8 documented, what is the likelihood that the WTO could any better deal with  
9 purely private collusive behavior, which is much more complex and much less  
10 well documented?

11              Even if countries within the WTO could agree on a least common  
12 denominator set of problems of anticompetitive practices that block private  
13 access -- and Eleanor Fox of your Committee has acknowledged that would be  
14 extremely difficult to do -- even if you could arrive on a set of principles, my  
15 guess is it would be a least common denominator. And in that case, what value is  
16 it if it takes us many years to achieve and fails to get at the heart of the problem,  
17 which is that the WTO is not, in my view, institutionally capable of dealing with  
18 the complex kinds of problems that we face particularly in the Japanese market?

19              When you add to the experience in the Film case the institutional  
20 challenges that we have the WTO, I think it becomes even more obvious that this  
21 is not the right solution. The WTO is being asked increasingly to serve as an  
22 international court that is a tryer of fact, rather than just an interpreter of WTO  
23 rules, which is largely what it was set up to be and what it was for many years

1 when GATT panels existed from the first creation of the GATT.

2                   The WTO lacks the professional expertise for this task. It has no  
3 full-time judges, no rules of evidence or procedure, very little transparency, no  
4 investigatory resources, and no expertise in competition law matters.

5                   Just as it is inappropriate to try to solve every political problem  
6 through the United Nations, it is equally inappropriate to try to solve every  
7 economic problem through the WTO just because it's the only multilateral  
8 institution we have to deal with trade.

9                   So if the WTO is not the answer, what is? Many people, including  
10 Assistant Attorney General Klein, have suggested in arguing against competition  
11 policy in the WTO that the answer is positive comity, cooperation with foreign  
12 antitrust authorities to get at the kinds of problems that were evident in the  
13 Kodak case.

14                  But with regard to positive comity agreements, they are effective  
15 clearly only if the other party has a viable competition authority that enforces  
16 laws that are at least similar to U.S. antitrust laws. A couple of weeks ago in  
17 hearing before the Senate Judiciary Antitrust Subcommittee, FTC Commissioner  
18 Bob Pitofsky said: "Even where an antitrust agreement exists, we can never be  
19 certain the antitrust authority that investigates and prosecutes the case will be  
20 successful." He added: "Although positive comity may be a valuable tool, it is  
21 important to recognize that it is a small piece in the developing mosaic."

22                  AAG Klein similarly has said that positive comity requires a high  
23 degree of confidence that the problem conduct will be adequately and promptly

1 investigated by home country authorities.

2               I would agree with both those standards. I would argue that Japan  
3 and particularly the Japan Fair Trade Commission do not come anywhere close to  
4 meeting either standard. Cartels such as those uncovered in the Kodak case and  
5 as I imagine my colleague from Guardian will talk about in the flat glass industry  
6 continue to thrive in Japan.

7               The JFTC not only fails to enforce the antimonopoly law against  
8 these practices, but in many cases actively encourages collusive behavior on the  
9 part of industry. Let me give you four examples.

10              In the Film case, the JFTC delegated to a trade association of  
11 photographic retailers called the Zenren the power to devise and enforce a code  
12 of industry self-regulation. This was called the Retailers Fair Trade Code, in  
13 which the Zenren threatened photographic stores that offered discounts or  
14 promotions.

15              I have and would like to pass around to the members of the  
16 Committee and for others afterwards, I suppose, a cartoon that until very recently  
17 appeared every month in the photographic trade industry journal in Japan. It's  
18 two figures, and what they're saying is translated below, two people holding up a  
19 sign. One figure is holding up a sign that says "Extremely cheap cameras" and  
20 the other one is holding up a sign that says "Bargain, sale cameras."

21              And over the sign that says "Extremely cheap cameras" there is a  
22 little bubble that says: "It is a violation without a doubt of the Retailers Fair  
23 Trade Code" -- a code set up with the acquiescence and encouragement of the

1 JFTC. Then the other side says: "Well, if you see a camera on sale, it may be a  
2 violation." And it gives a phone number to call or a fax where you can send the  
3 advertisement, and the retailer fair trade organization will crack down on the  
4 renegade retailer who has dared to offer a discount. This is like providing the  
5 number for the FBI if there's a blue light special at Kmart.

6               Again, I want to emphasize this is behavior not only condoned but  
7 encouraged by the antitrust enforcement authority in Japan.

8               Second example, the manufacturing level. In response to a  
9 complaint filed by Kodak, late last year the JFTC found that the four major  
10 manufacturers of photographic paper in Japan were exchanging highly  
11 disaggregated, competitively sensitive data relating to their output and sales on a  
12 monthly basis. This is an obvious form of collusion and a clear violation of U.S.  
13 antitrust law.

14              Yet the JFTC simply asked the firms to stop the practice without  
15 further inquiring. There was no effort made to inquire as to how this data was  
16 being used, in particular to determine whether it was being used in a price fixing  
17 scheme, and there has been no ongoing effort to ensure compliance with the  
18 JFTC's request.

19              Third, the graphic electrodes case, a recent, somewhat famous case  
20 in which a clear cartel-like behavior was established among U.S., German and  
21 Japanese firms in the graphic electrodes industry. The Justice Department  
22 imposed the largest criminal fines in its history against firms in that case. The  
23 JFTC issued a warning.

1               Fourth, look at the statistics. Between 1962 and 1994, the JFTC  
2 took by its own records a total of 124,045 enforcement actions, of which 683  
3 were formal cease and desist orders. That's .5 percent. The rest of them were  
4 informal requests, administrative guidance, and warnings.

5               But even of those actions that were taken, it's fair to ask, were they  
6 taken to deal with antimonopoly law enforcement or other types of laws? And in  
7 fact, again the JFTC's records show that of the cases, and this time taken between  
8 1977 and 1992, only 2.3 percent of all enforcement actions in Japan by JFTC or  
9 prefectural authorities were taken on the antimonopoly law. All the rest, 98  
10 percent, were enforcements of the premiums law. The premiums law is not a law  
11 designed to get at anticompetitive practices. It is a law which emphasizes  
12 restrictions on business marketing.

13              In other words, 98 percent of antitrust enforcement activity in  
14 Japan over that period of time was focused on cracking down on retailers who  
15 had the temerity to offer discounts.

16              Given these four examples, it is simply not realistic to assume that  
17 a positive comity agreement with Japan would produce meaningful results. The  
18 Department of Justice, as it should, has a bias toward protecting the interest of  
19 consumers and standing up for free market principles. But in Japan we're dealing  
20 with an economy that is fundamentally based on subordinating the interest of  
21 consumers to the interest of manufacturers and in which free market principles as  
22 we understand them from an antitrust context do not exist and have never existed.

23              In this environment, the traditional Justice Department approach of

1 relying on positive comity is in our view not likely to be very effective.

2                   So what's the answer? If not WTO and not positive comity, what  
3 other options are there? We think that, just as these issues are a mix between  
4 trade policy and competition law policy, so the solution must be a mix. Various  
5 people, including some at these hearings, have suggested an approach to the  
6 market access problem that would give the U.S. Government the authority to  
7 issue cease and desist orders against foreign anticompetitive practices that  
8 restrict U.S. commerce. In fact, you can argue that that authority exists under  
9 current law, but it's not being used.

10                  The proposal that Congressmen Sander Levin and Amo Houghton  
11 have suggested is to expand the authority of the U.S. Trade Representative under  
12 Section 301 of the 1988 Trade Act to take action against the kind of collaboration  
13 between foreign governments and private industry which the Film case saw.

14                  I think what's important in the area that we're talking about is to  
15 find some way to inject the interests of the trade agencies into an area in which  
16 traditionally they have traditionally not been involved. How do you do that in a  
17 way that preserves the interests of all concerned, but that also gets at the  
18 objective of opening up foreign markets?

19                  Another example, another proposal that's been suggested, is to  
20 have an independent authority like the International Trade Commission make a  
21 finding that foreign anticompetitive practices exist and are creating a barrier to  
22 U.S. commerce and have that finding create a presumption of action on the part  
23 of one of the existing enforcement authorities, either the Justice Department or

1 the FTC, with the notion, just as you have in antidumping law, that there's a  
2 strong presumption in favor of the initial finding and that that would incent the  
3 enforcement agencies to use the authority which they already have under existing  
4 law to take action against these foreign practices.

5           We think both these ideas have merit and bear further study and  
6 hopefully perhaps the endorsement of this Committee. But it's clear that neither  
7 the WTO nor positive comity is going to work.

8           I would just conclude by making one other comment. This is not  
9 related to trade and competition policy, but one other aspect of the Committee's  
10 work and that is with regard to merger review. We've recently been through some  
11 of these experiences, as I'm sure other witnesses before you have been, in our  
12 case particularly regarding a recent acquisition of some medical imaging  
13 business from Imation.

14           Before we could completed that acquisition we had to research  
15 filing requirements and submit pretransaction filings with more than ten different  
16 competition authorities, each with different information and timing requirements.

17   Procedural disparity made it necessary for us to stagger the closing of the deal,  
18 cost us millions of dollars, and delays in the integration of our acquired  
19 businesses.

20           We think the proliferation of preclosing filing requirements is a  
21 significant barrier to getting business done quickly and efficiently. We urge you  
22 to closely consider this problem. One method we know that's been proposed to  
23 resolve this situation would be the adoption of a filing common filing form for

1 all international transactions that meet certain specified size and transaction  
2 thresholds, and we don't understand why there would be any resistance to that  
3 kind of common filing requirement.

4 Thank you for the opportunity to be here.

5 DR. STERN: Thank you.

6 We'll just go right on and hear our next guest. Steve, are you  
7 prepared to give us your experience at Guardian, I suspect in the Japanese market  
8 as well.

9 MR. FARRAR: Yes. Thank you very much. My name is Steve  
10 Farrar. I'm the Director of International Business at Guardian Industries, which,  
11 since Guardian is not quite the household name that Kodak is, I might explain is  
12 a manufacturer of flat glass products worldwide, primarily for use in automotive,  
13 construction, and furniture and related industries.

14 We circulated an analytical white paper some weeks ago that  
15 described in some detail our experiences in the Japanese market. So I will only  
16 make some summary observations today.

17 Before beginning, though, I would like to commend the Advisory  
18 Committee for its willingness to take on this difficult question of how you handle  
19 issues that have elements both of trade policy and competition policy. And as  
20 your hearings have revealed and as we've heard today, foreign anticompetitive  
21 conduct is a persistent and enormously costly problem for many U.S. companies  
22 involved in foreign markets.

23 Clearly, those markets are not really open if competition laws are

1 inadequate or if the laws themselves are not being adequately enforced. In  
2 Guardian's view, the United States antitrust enforcement agencies must  
3 aggressively investigate and prosecute persistent anticompetitive conduct abroad  
4 that harms U.S. exporters when foreign antitrust authorities cannot or will not  
5 rise on the occasion. While legal action is not always required, foreign  
6 authorities are much more likely to be cooperative if they understand that if they  
7 fail to act the United States can and will act on its own.

8               Now, a few words about our experience in Japan. Despite vigorous  
9 efforts over more than a decade and despite the existence of bilateral trade  
10 agreements on flat glass signed in 1992 and 1995, Guardian has not been able to  
11 achieve meaningful access to the Japanese flat glass market.

12              Today, as in 1992, '95, and '97, we account for barely one percent  
13 of Japan's flat glass market. By contrast, in most other major foreign markets  
14 without significant entry barriers we typically have a market share in the 10 to 20  
15 percent range.

16              Japan's distribution system is at the heart of the problem. With  
17 minor exceptions, neither glass distributors nor glass fabricators will handle our  
18 products in significant volume, even though our products are of the same or  
19 higher quality as those sold domestically and our initial price quotes are  
20 typically 30 to 50 percent below domestic prices.

21              Japan's three manufacturers of flat glass -- Asahi Glass Company,  
22 Nippon Sheet Glass Company, and Central Glass Company -- control the  
23 domestic distribution system. This oligopoly uses its longstanding market power

1 to block new entry and thereby preserve the status quo.

2               This situation was described by Committee member Eleanor Fox in

3 her 1997 article entitled "Toward World Antitrust and Market Access."

4 Professor Fox suggested that the Japanese flat glass market could provide an

5 example of two areas of antitrust that are most relevant to blockage of markets:

6 first, a cartel with an accompanying boycott; and second, a vertical agreement or

7 collaboration that tends to exclude market actors.

8               The conduct identified by Professor Fox in 1997 persists today.

9 Japanese manufacturers continue to use similar exclusionary and coercive

10 conduct to prevent distributors from making rational economic decisions about

11 the products they purchase. Among the most widespread and pernicious

12 practices are the setting of sales quotas, providing disguised after-market sales

13 rebates and misusing equity holdings. Let me comment briefly on each.

14               First on sales quotas, salesmen for Japanese manufacturers

15 frequently impose unwritten sales quotas. Their customers, the distributors, are

16 not free to buy from foreign sources until this arbitrary quota has been filled.

17 The distributors who fail to meet their quotas are vulnerable to many forms of

18 retaliation. For example, a maverick distributor could find himself with greatly

19 increased costs of doing business because his manufacturer has denied him a

20 favorable credit reference at his affiliated keiretsu bank.

21               With regard to after-sale rebates, distributors who fill their quotas

22 are still in effect given a form of preferential payment for returned steel racks,

23 which are the racks used to ship the glass.

1               Regarding equity positions, domestic glass producers are  
2 increasingly consolidating their market by taking equity positions in the key  
3 distributors, particularly the larger, more efficient ones. The predictable and  
4 intended effect of such vertical integration is to prevent key distributors from  
5 accepting competitive offers from new entrants.

6               The intrusion of the Japanese manufacturers into the inner  
7 workings of key distributors is so great that they insist on and obtain regular  
8 access to the financial records of their affiliated distributors. This allows them  
9 to keep a careful eye on procurement patterns to ensure the distributors are  
10 meeting their quotas and limiting purchases of non-Japanese flat glass.

11              Because of these exclusionary business practices, foreign suppliers  
12 as a group have failed to gain a meaningful or sustainable foothold in the market.  
13 Nonaffiliated foreign producers account for only an estimated 5 percent of  
14 Japanese consumption, and of that U.S. companies account for barely 2 percent.

15              In the wake of recent Congressional hearings and expressions of  
16 concern from U.S. antitrust authorities, Japanese officials have begun to claim  
17 that their domestic industry is suddenly competitive. They point to recent price  
18 competition among domestic and foreign firms and some long overdue  
19 downsizing of excess capacity. These claims are misleading at best.

20              The fact it is that domestic manufacturers continue to engage in a  
21 sophisticated form of price and nonprice predation to prevent new entrants from  
22 gaining a foothold in the market. For example, in order to retain market share  
23 Japanese manufacturers are using their distribution systems as information

1 networks to monitor the sales calls and quotes of Guardian and other foreign  
2 suppliers. Having obtained competitive information about new entrants, the  
3 Japanese producers then selectively meet or undercut low price quotes in order to  
4 prevent the distributor from doing business with a new entrant.

5               This so-called new competition is simply another way for the  
6 Japanese manufacturers to use their market power and financial leverage over  
7 distributors to repel meaningful competition from non-Japanese firms.

8               Guardian believes that the best long-term solution to Japanese  
9 market foreclosure is for the Japanese antitrust authorities to investigate and  
10 prosecute the matter. To date, Japan Fair Trade Commission has been unwilling  
11 to act forcefully.

12              As an interim step, the U.S. Government has tried to find ways to  
13 encourage Japan to strengthen its compliance with its own antimonopoly laws.  
14 Last spring, the Justice Department's Antitrust Division and the Office of the  
15 U.S. Trade Representative studied the antitrust compliance plans of the Japanese  
16 flat glass companies. They did so because it appeared that commitments to end  
17 anticompetitive practices that were made by senior management in the Japanese  
18 flat glass companies were not being effectively communicated down to the sales  
19 people in the same companies.

20              As a possible remedy, Justice and USTR put forward a model  
21 antitrust compliance plan based on U.S. practices. It was disappointing to  
22 Guardian that Japan flatly refused to even discuss the model plan put forth by the  
23 U.S. Government. However, Japan's stonewalling was hardly a surprise. For

1 many years Japan has refused to recognize that it has a serious competition  
2 problem in its flat glass industry and has refused to take meaningful steps to  
3 solve it.

4               During the 1990s, the U.S. and Japan have negotiated two bilateral  
5 agreements in an attempt to open the market for competition. Trade agreements  
6 are, however, blunt instruments to deal with deeply ingrained cartel business  
7 practices. And in this case the Japanese government and the Japanese flat glass  
8 companies have used the trade agreements as an excuse to avoid dealing with the  
9 root cause of the market foreclosure.

10              Instead, they have taken steps in compliance with the trade  
11 agreements that were ineffective or were quickly reversed when the political  
12 pressure to comply subsided that. That is Guardian has urged the U.S. antitrust  
13 agencies and the U.S. Congress to pursue the matter under antitrust laws, either  
14 ours of theirs.

15              As this Committee knows, the U.S. has unilateral authority to act  
16 when U.S. exporters are harmed by anticompetitive conduct abroad. The Foreign  
17 Trade Antitrust Improvements Act is a jurisdictional statute that permits the U.S.  
18 antitrust agencies to prosecute foreign anticompetitive conduct in our courts.

19              Guardian would like to see that statute strengthened by eliminating  
20 any possibility that it could be misinterpreted through guidelines or other devices  
21 that incorporate extrastatutory requirements such as a showing of harm to  
22 consumers. Legislation to do this is pending in the House of Representatives and  
23 is likely to be introduced in the Senate in the near future.

1           Even more importantly, there is the perplexing question of what  
2 can be done to bolster the ability of U.S. antitrust authorities and plaintiffs to  
3 investigate foreign anticompetitive conduct, particularly to discover evidence  
4 when it's located abroad. The problem has been talked about for many years, but  
5 to our knowledge no workable solutions have been proposed. We urge the  
6 Committee to deal prominently with it in the Committee's final report.

7           Since legislation will almost certainly be part of a solution, the  
8 Committee may want to consider a Congressional commission. Of course, we  
9 consider it important that the business community have a role in any new  
10 deliberative process to address this problem that may be recommended.

11           As the Committee is aware, two weeks ago during the visit of  
12 Japanese Prime Minister Obuchi the Department of Justice and the Japan Fair  
13 Trade Commission announced a joint U.S.-Japan antitrust cooperation  
14 agreement. This agreement is similar in most respects to the agreement the U.S.  
15 already has in place with the European Union.

16           At a recent hearing convened by the Senate Subcommittee on  
17 Antitrust, Competition, and Business Rights, both the chairman and the ranking  
18 minority member expressed deep skepticism about whether Japan was up to the  
19 task of being an equal partner with the U.S. under the antitrust cooperation  
20 agreement. They cited Japan's refusal to tackle the market access problems in its  
21 flat glass industry as one of the reasons for their doubts.

22           Not surprisingly, Guardian shares these doubts, based on our years  
23 of frustration in attempting to convince the Japanese Ministry of International

1 Trade and Industry to honor its obligations under trade agreements. Guardian  
2 has pledged to work with the U.S. Department to pursue the flat glass issue to a  
3 conclusion under the new joint commission obligation or, if necessary, through  
4 unilateral action on the part of the U.S. We believe that the flat glass issue will  
5 test whether the Japan Fair Trade Commission is up to the challenge of  
6 partnership with the U.S. antitrust authorities.

7               To conclude, Guardian believes that private anticompetitive  
8 business practices represent significant barriers to access to foreign markets to  
9 U.S. firms. In removing this barriers, it is important for the U.S. to act  
10 cooperatively when we can. But when we cannot, it is important to retain the  
11 necessary unilateral authority to act.

12              Up to now, the cooperative approach with Japan has had no  
13 meaningful effect on a serious market access problem in flat glass. As we go  
14 forward, we should be prepared to use all the statutory tools at our disposal, and  
15 we should consider forging new tools if those at our disposal prove to be  
16 inadequate.

17              Thank you, Mister and Madam Co-Chairs. I'd be happy to answer  
18 questions.

19              MR. RILL: Thank you.

20              DR. STERN: Thank you very much.

21              I'd like to hold the questions until we hear the whole panel. So  
22 we're now going to turn, I suspect, to Europe. Welcome, if you let me, Mr. Co-  
23 Chair, and give me some indulgence to welcome Drew Wechsler again and to

1 welcome Ray Calamaro, two very dear friends of mine who, as I think about how  
2 long I've known them, it's basically through the seventies and eighties I've had  
3 the privilege of working both with Ray on the Hill and Drew and I have worked  
4 together, Drew worked with me at the International Trade Commission for many,  
5 many long years and still collaborating. So it's a real personal, personal pleasure  
6 to welcome you here.

7                   We're very happy to have Mr. Stevenson from the United Parcel  
8 Service, who is going to give us the benefit of UPS's experience in the European  
9 market. How do you wish to proceed, Mr. Stevenson? Please. Welcome.

10                   MR. STEVENSON: Thank you. With the Committee's permission,  
11 I would like to submit a full written statement with attachments on behalf of UPS  
12 and I will try to summarize that statement here today.

13                   On behalf of United Parcel Service, I want to express my  
14 appreciation for the opportunity to present a statement before this distinguished  
15 Advisory Committee.

16                   As a way of beginning, I would like to give you a very brief  
17 summary of my background. My name is Larry Stevenson. I'm the Vice  
18 President of International Industrial Engineering for United Parcel Service. I'm  
19 responsible for all industrial engineering activities outside the United States. I  
20 report to the President of UPS International.

21                   With me are Ray and Drew, as you've already introduced, and also  
22 Phil Larson of the same firm as Ray, who is our antitrust counsel.

23                   This is my -- this year I celebrate my fiftieth birthday and my

1 twenty-fifth anniversary with UPS. I began my career as an unloader and then  
2 advanced to sorter and driver and have worked my way up to my present position  
3 through the ranks. This is my fourteenth year of working in international  
4 operations for UPS.

5 I have lived twice in Germany, twice in the UK, and once in  
6 Brussels in that time. Today I travel to operations around the world from our  
7 world headquarters in Atlanta, visiting our operations and engineers in an effort  
8 to improve service and reduce costs, using process reengineering, improved  
9 operating computer systems functionality, and traditional engineering  
10 techniques, likes method and measurement improvement, and so forth.

11 Since I'm not a lawyer, my area of expertise is how improper  
12 practices by state-owned or state-sanctioned monopolies affect the day-to-day  
13 struggle of our people to earn a living and a reasonable profit by providing  
14 service excellence to our customers.

15 As a way of beginning, I would also like to give you some  
16 background information on UPS. The matters I would like to discuss with you  
17 today come within the Committee's agenda item identified as trade and  
18 competition interface issues. UPS itself in its day-to-day business epitomizes the  
19 combination of vigorous international trade and dynamic competition.

20 Before addressing the subject at hand and knowing that everyone  
21 here is probably very familiar with UPS and its business and it's been a long day,  
22 I would like to provide just a few facts about UPS of which you may not be  
23 aware.

1           UPS is the largest shipping company in the world. It operates in  
2 more than 200 countries and territories, delivering more than 12 million packages  
3 each day. While some people think that international trade means fewer U.S.  
4 jobs, just the opposite is true for UPS, which creates one new U.S. job for every  
5 70 international packages that enter or leave the United States. UPS is the third  
6 largest employer in the U.S.

7           Although everyone is familiar with UPS vehicles and delivery  
8 personnel, it may come as a surprise that UPS is also a high-tech company, an e-  
9 commerce leader, and a financial services company, as explained in my written  
10 statement.

11           With 224 jet aircraft, UPS is the tenth largest airline in the United  
12 States. It's no surprise, therefore, that UPS is virtually synonymous with trade.  
13 UPS also means competition because not only do we compete, but our very  
14 mission is to help our customers compete, assisting them with just in time  
15 inventory control and advanced logistics services.

16           The trade and competition issue I would like to discuss today  
17 involves abuse or improper practices by state-owned or state-sanctioned  
18 monopolies. Virtually every government in the world, including our own, grants  
19 vast powers to certain monopolies. We're all accustomed to monopolies in such  
20 areas as energy, telecommunications, transport, and postal services.

21           A significant problem arises when a monopoly abuses the very  
22 special power granted to it by its own government. Not only are such abuses  
23 inconsistent with the public policy reasons for granting the monopoly in the first

1 place, but they can also be significant distortions of competition, as with the  
2 specific case I would like to discuss with you in a moment.

3           Besides being a distortion of competition, monopoly abuse can be a  
4 very serious trade barrier when it is aimed at or significantly affects a foreign  
5 competitor. The particular kind of monopoly abuse on which I would like to  
6 focus this afternoon is improper cross-subsidies or state aids. In particular, I'm  
7 referring to the subsidies or state aids from state-owned or state-sanctioned  
8 monopolies to their privatized or deregulated sibling entities or activities.

9           In some instances there's no clean line between the monopoly  
10 activity and the non-monopoly commercial activity. It is in these case where the  
11 improper cross-subsidy or state aid can be particularly insidious. Although this  
12 is not the appropriate forum to adjudicate a specific competition or trade matter,  
13 I would like to discuss one actual example where the abuse is so serious and the  
14 potential distortion of trade is so significant that it is worthy of this Committee's  
15 attention.

16           This specific case involves the German postal service. In July of  
17 1994, UPS filed a complaint with the EU's competition authority, DG-IV of the  
18 European Commission, alleging, among other things, that the German postal  
19 service inappropriately cross-subsidizes its nonreserved and nonmandatory  
20 services with funds derived from its highly profitable regulatory monopoly.

21           The German post reportedly makes huge profits on its postal  
22 monopoly since it charges 66 cents for first class mail, twice the cost of the  
23 United States stamp. In fact, the German post's 66 cents is reportedly the second

1 highest rate in the world.

2               UPS's complaint against the German post alleges that, because of  
3 the cross-subsidies that German post nonreserved commercial activities are  
4 offered at unjustifiably low prices. This in itself is a distortion of competition  
5 and a violation of Article 86 of the EC Treaty. In addition, UPS's complaint  
6 charges that the German post's non-reserved commercial activities benefit from  
7 inappropriate state aids, a violation of Article 92 of that treaty.

8               Because of these subsidies and other improper benefits which the  
9 German post's non-reserved commercial activities receive, the German post is  
10 able to do more than just compete with unjustifiably low prices. It has also gone  
11 on a virtual shopping spree, acquiring companies in Europe and in the U.S. which  
12 expand its strength in the market and its ability to compete unfairly.

13              There was a January 10th "Wall Street Journal" article that  
14 describes the situation graphically and we believe generally accurately. A copy  
15 of that article is submitted with the full text of my statement.

16              UPS filed its complaint in the European Commission nearly five  
17 years ago and the Commission still has not acted. It is obvious to us at UPS that  
18 if our complaint had no or even little merit, it would have been dismissed long  
19 ago.

20              Another point worth mentioning is that UPS's complaint could have  
21 probably been even stronger if we had access to all the underlying facts.  
22 Unfortunately, there's a significant lack of accounting transparency in the  
23 German post's activities. For that reason, the underlying accounting data are

1 simply not available to the UPS in a way that would allow us to document the  
2 problem fully and clearly.

3 I mention that because I know that transparency is a concern to this  
4 Committee, but also because if we did have the full picture I have no doubt that  
5 our case as set forth here and to the EU would be even stronger and more  
6 convincing.

7 The stakes here are very significant for UPS. The German post's  
8 activities threaten \$800 million to \$1 billion in UPS service revenues in  
9 Germany, not to mention our very substantial investment in that country. But  
10 UPS's German market is also an important part of our European operations,  
11 where billions more are threatened by the German post's unfair competition.

12 This issue is bigger than UPS versus the German post. An  
13 important principle is at stake here. If unchecked, the German post's actions can  
14 become a dangerous precedent where state-owned or state-sanctioned monopolies  
15 are liberalized or deregulated or even if they just have commercial, in other  
16 words non-monopoly, operations.

17 We find such monopolies in key sectors of virtually every country's  
18 economy, including transportation, energy, telecommunications, and of course,  
19 postal services. Each of these sectors is subject to potential monopoly abuse  
20 from cross-subsidies or from improper state aids. It is difficult to imagine how  
21 such abuse would not be a very significant distortion of competition wherever it  
22 might exist.

23 The Deutsche Post matter is not only a competition distortion, but

1 also a serious trade issue. On one level, state monopolies raise what are  
2 essentially domestic questions of economic and competition policy. However,  
3 where the kind of monopoly abuse described here is directed against or in a  
4 significant way adversely affects foreign competitors, there is the potential for a  
5 very serious international trade barrier, often a kind of domestic protectionism,  
6 as in the case of the German post.

7               UPS believes it has a strong trade case here and we have taken it up  
8 with the U.S. Government. However, before resorting to all the trade remedies at  
9 our disposal, UPS would rather ask the U.S. Government to strongly encourage  
10 EU authorities to enforce their own competition law. UPS also hopes that our  
11 government can encourage the German government to take all necessary steps to  
12 end the German post's inappropriate cross- subsidies and-or state aids.

13              UPS believes that the U.S. and the EU should find that they have a  
14 great deal in common when it comes to ending monopoly abuse. One reason for  
15 this is that both the U.S. and the EU are often trying to expand their markets in  
16 other countries where they face barriers resulting from the very same kinds of  
17 monopoly abuse. In short, we want our government to encourage the EU to do  
18 the right thing because it is in the EU's own interest and even in Germany's  
19 interest to do so.

20              And this leads me to why UPS is so appreciative of this  
21 Committee's invitation to tell our story together. Although we believe that our  
22 government can encourage the EU to do the right thing, we are realistic and we  
23 know that this will take a lot of encouraging. Just because it is the right thing to

1 do doesn't mean a government, whether it is the EU, U.S. or any other  
2 government, will do it.

3           Everywhere in the world, including the U.S., Germany and other  
4 countries, there are strong parochial interests. To overcome these interests, the  
5 EU will need strong, high level, and consistent messages from the U.S. on this  
6 subject. Such messages have already begun to be issued by the U.S. Government  
7 and we have every hope that they will continue and become even stronger in the  
8 very near future.

9           There is, however, a very special role which this Committee can  
10 play. That role is based on the June 4, 1998, agreement between the U.S. and the  
11 EU on positive comity in competition enforcement. I'm sure I don't need to  
12 explain that agreement to this Committee, but I will say only that we at UPS feel  
13 this is an ideal case for the U.S. to request positive comity from the EU.  
14 Specifically, we would believe that it would not only be appropriate but also  
15 urgently necessary for this Committee to recommend that the Justice Department  
16 and the Federal Trade Commission immediately request that DG-IV rule  
17 promptly and fairly on the complaints against DPAG by UPS and others.

18           We urge that such a rule should be based on a full and clear record  
19 that indicates all the relevant facts. There is very little doubt that such a request  
20 would be in furtherance of the law and policy in the U.S. and the EU. My written  
21 statement which has been submitted to this Committee contains extensive  
22 citations and support of the proposition that cross-subsidies by monopolies like  
23 those I have described today are contrary to law and policy in the U.S. and the

1 European Union.

2               UPS has taken a consistent position in opposition to monopoly  
3 abuse and cross-subsidization right here in the United States, by the United  
4 States Postal Service. We have spoken out forcefully against proposals in  
5 Congress that would create an insufficient firewall between USPS's reserved  
6 monopoly activities and its nonreserved or commercial activities. UPS believes  
7 that the same rules it advocates for Germany or any other country should also  
8 apply here in the U.S.

9               Although USPS's actions have also created competitive distortions,  
10 those distortions do not yet have as great a known effect on international trade as  
11 those of the German Post.

12              In closing, I thank you for your attention today and I look forward  
13 to answering your question. Thank you.

14              DR. STERN: Thank you very much. Very, very clear.

15              Is there further presentation? Yes, Drew.

16              MR. WECHSLER: I have a short presentation.

17              MR. RILL: Excuse me. May I just make a preliminary comment  
18 that I've been hesitating to make? I think, as for all panelists, you are well  
19 aware, as you indicated, that we're not in a position to adjudicate the facts of any  
20 particular instance, and so we really -- I mean, if the WTO has very poor fact-  
21 finding abilities, ours are somewhat less. So we'll certainly take what you say at  
22 its own face value and have a policy observation perhaps during the question  
23 period, but we can't be expected to judge merits of any case.

1                   MR. STEVENSON: Understood.

2                   MR. WECHSLER: Thanks for your charming introduction earlier.

3 I hope I live up to it.

4                   I had the luxury and pleasure of being asked by UPS to look at the  
5 entry into unregulated markets by state-owned enterprises, or SOE's, and  
6 regulated monopolies to determine what the competitive effects were, if any, and  
7 to ascertain whether they constituted a threat to international competition.

8                   I will summarize my paper which has been submitted. As in  
9 Mr. Rill's caution, I did not seek to determine the facts of any particular dispute,  
10 just to determine the trends and the potential problems.

11                  There is a major worldwide trend now of corporatizing and  
12 privatizing SOE's. Regulated monopolies and SOE's are entering deregulated  
13 competitive activities. This raises several major questions. Is cross-  
14 subsidization a serious problem worthy of attention? Does it have significant  
15 international effects? If so, what kinds of actions would be needed to promote  
16 welfare and growth?

17                  Cross-subsidization is not really a very debatable issue any longer.  
18 It has long been accepted as a significant issue in the regulation of industries  
19 based on their returns on costs and investments. Shifting of costs from  
20 competitive activities to regulated ones results in overconsumption and  
21 underpricing of the competitive good, and overpricing and underconsumption of  
22 the regulated good. Consumers of the regulated good are forced to pay a hidden  
23 tax to underwrite a subsidy to which neither they nor their government ever

1 agreed.

2           The domestic and international impact is to undermine competition  
3 on the merits. We must be very careful in a competitive market to understand  
4 what competition does. The market forces market participants to utilize  
5 opportunities to respond to incentives. Cross-subsidization creates an  
6 opportunity for the market to induce people to engage in bad behavior.

7           Unsubsidized rivals become disadvantaged; this is also an equity  
8 problem. Inefficiency is rewarded, despite the basic premise of privatization  
9 often being claims of increased efficiency. We can work from a presumption that  
10 state-owned enterprises are less efficient than those in the private market.

11 Otherwise, there would be little incentive to deregulate them in the first place.

12           Investments are discouraged, technological change is injured, and  
13 predatory pricing -- long frowned upon as a concept -- can become a possibility  
14 in this kind of framework.

15           The problem is both serious and expanding. First, the sectors  
16 involved are huge -- utilities, energy, transport, communications, postal services.  
17 Literally millions of jobs and hundreds of billions of dollars in U.S. GDP is  
18 found in these sectors.

19           The fact that they provide key infrastructure to the entire economy  
20 makes them politically sensitive and vulnerable for heavy-handed intervention if  
21 competition is mishandled. These affected sectors are currently globalizing very  
22 rapidly, which brings us to the international consequences. It raises the  
23 possibility of painful transfers among nations, which are never without political

1 consequences. It spawns pressure for protection and the picking of home country  
2 winners in response.

3           A company like UPS can fear the initial problem. But it can also  
4 fear the response to that problem if, for instance, its major domestic rival  
5 becomes the anointed standard bearer in a response. Such king making  
6 diminishes global welfare.

7           The remedies lie in a proactive stance by the U.S. Government to  
8 recruit other governments, particularly the EU, to defend growth and equity, to  
9 expand an awareness of the problems and costs of cross-subsidization (not all  
10 that different than subsidization itself), and to take action before anticompetitive  
11 constituencies are created which could sustain the problem long into the future.  
12 This requires real transparency in accounting, adequate rules and statutes for the  
13 new era, and effective domestic and international enforcement. All these themes  
14 and examples are developed in the paper I have submitted.

15           DR. STERN: Thank you very much.

16           I think that then completes the testimony, which gives us the  
17 opportunity to ask some questions. Jim, Professor Dunlop?

18           MR. RILL: I do have a number of questions.

19           DR. STERN: Professor Dunlop, do you have some --

20           MR. RILL: But John has been so patient and quiet, and I don't  
21 want to --

22           MR. DUNLOP: Go ahead.

23           MR. RILL: No, no. You please go ahead.

1 DR. STERN: We've all been aware that we've monopolized things.

2 MR. DUNLOP: Am I to come away from your testimony with the  
3 notion that all cross- subsidization is inappropriate and anticompetitive, or are  
4 you going to tell me some kinds of it are competitive. I can say only in passing  
5 all health care involves an enormous cross-subsidization between people who are  
6 well and people who are sick. So I'm trying to figure out what your position  
7 really is.

8 MR. WECHSLER: You have zoomed right in on a central issue  
9 which cannot be settled in 20 seconds. There is a long history of examining the  
10 instances in which cross-subsidization may not be a problem. And the answer  
11 changes over time as regulatory economic analysis improves. There are great  
12 debates in each affected industry on how to handle fixed cost and how to  
13 distribute them among regulated and nonregulated entities.

14 I have avoided offering any "magic bullet." But what I will say is  
15 that in our regulated industries, the likelihood of tremendous problems has been  
16 reduced over the years by the regulatory process acting over time. At the margin,  
17 there may be problems one way or the other and they still matter if your firm is  
18 on the wrong end of it. But the process has reduced such problems.

19 Here, we have been considering a deregulatory trend begun with  
20 some amnesia about the fundamentals. We must face the question again and  
21 again, "If there is an opportunity and an incentive for bad behavior, are we going  
22 to get an anticompetitive response?" I'll give one example which goes to your  
23 question, Professor.

1           In telephony there are various cross-subsidies that have been, in  
2 effect, forced on local telephone providers in the past to provide universal  
3 service. The goals were worthy ones. Now, as one introduces competition, the  
4 market can cut in very complicated ways in two directions.

5           A regulated monopolist in local service may have been forced to  
6 engage in this cross-subsidization, while the new competitor may not have been  
7 saddle with this cost. One then gets a debate over whether to charge the new  
8 competitors a fee to balance out the market? Or instead, do we free the regulated  
9 monopolist from a burden originally imposed for social reasons?

10           I think economic theory supports a general tax as more efficient  
11 than forced cross-subsidization to accomplish goals like universal service.

12           MR. RILL: I think if we're going to get into the telecom issue it's  
13 going to take a lot more than 20 minutes.

14           MR. DUNLOP: Well, you're not trying to sell me on the  
15 proposition that any cross-subsidization is inherently either uneconomic or anti-  
16 public policy or something, because the case you cite, I'm perfectly prepared to  
17 look at. At times it seems to me this was a universal principle and I do have  
18 trouble with that.

19           MR. RILL: I agree with you.

20           DR. STERN: Further questions? Jim?

21           MR. RILL: I have a number of questions, and cut me off when I'm  
22 going too long. First of all, let me congratulate the panelists for coming here and  
23 giving us their experiences. I think those are very enlightening experiences and

1 I'm familiar with some of them at a variety of levels. But I think it is good and  
2 very forthcoming of you to present your views.

3 Chris, let me ask you, did Kodak apply to the Department of  
4 Justice for the exercise of positive comity?

5 MR. PADILLA: Yes.

6 MR. RILL: It did?

7 MR. PADILLA: In the case that I referred to, in which the JFTC  
8 found the sharing of disaggregated data among photographic paper  
9 manufacturers, we did apply to the Department of Justice for referral and they  
10 declined to give us one.

11 Basically, the reason that was given was that they could find no  
12 harm to Kodak from this scheme. Our argument that the scheme itself with the  
13 sharing of the data was perhaps of concern to Japanese consumers, perhaps ought  
14 to be of concern to the JFTC, but they could not find a harm to Kodak that would  
15 justify in their minds a referral.

16 And that is why in my view, while I certainly wish Guardian the  
17 best of luck, and if they succeed, believe me, we'll be right in there behind  
18 them --

19 MR. RILL: I don't know whether they enjoyed that comment.

20 MR. PADILLA: The question, though, really revolves around what  
21 incentives are there to, in a sense, require the Justice Department and/or the FTC  
22 to take action which they have authority to take. And in our case, despite our  
23 request, they refused to make a referral.

1                   MR. RILL: The request for positive comity was limited to the  
2 sharing of disaggregated data --

3                   MR. PADILLA: Yes.

4                   MR. RILL: -- and not the other courses of conduct of which you  
5 complained?

6                   MR. PADILLA: No, in fact we submitted the entire body of  
7 evidence to them. We focused on the disaggregated data first because we thought  
8 it was the best, it offered the best hope, given that it's -- and I'm not an antitrust  
9 attorney -- a pretty clear violation of what would be U.S. antitrust laws if we  
10 were to share disaggregated data in a trade association.

11                   And that was the case that we had filed with the JFTC under article  
12 45. So we thought this was clearly the best place to start, and it was a case that  
13 we had filed in 1996, I believe, and we hadn't gotten any action, which is why we  
14 thought a referral would help.

15                   We didn't get one. As it turns out, the JFTC acted on its own. It  
16 acted last fall, shortly after the U.S. Trade Representative issued a report  
17 following up on the film market access issue, this monitoring report that USTR  
18 promised they would do. And we think that the scrutiny of that may have  
19 incited the JFTC to make public its findings.

20                   MR. RILL: Which leads me to the next question. Talking about  
21 the Trade Representative, you suggested at least one of the possibly meritorious  
22 proposals was to have findings made by the ITC, which would then become  
23 factual findings, which would then become binding, I suspect, on the antitrust

1 agencies or whomever.

2 MR. PADILLA: Or compelling, at least.

3 MR. RILL: Yes, excuse me. You said presumptive.

4 MR. PADILLA: Right.

5 MR. RILL: Could you tell us how those findings by the ITC, these  
6 threshold findings, would be superior to the threshold findings of the FTC or the  
7 Department of Justice, and why the ITC is a better organ for making those  
8 findings than the Department of Justice or the FTC?

9 MR. PADILLA: Because they have a trade orientation and an  
10 understanding of how foreign anticompetitive practices can be used explicitly as  
11 a trade barrier. In our discussions with the Justice Department -- and through no  
12 fault of the Justice Department, let me add. They come at this from a perspective  
13 of the protection of interests of consumers primarily, and are not coming at this  
14 with a historical perspective that maybe USTR or the ITC may come at it, which  
15 is a perception of how individual barriers like disaggregated data, when added to  
16 other things, add up to a scheme that essentially conspires to keep foreign  
17 companies out of the market.

18 It's making that jump to see the bigger picture where we, at least,  
19 have felt that the Justice Department and the FTC have, perhaps because of the  
20 orientation from which they come, are not as willing to go. And we think that  
21 perhaps the trade agencies may be more willing to do that and it would inject the  
22 trade perspective into this issue, but also keep the enforcement where it belongs,  
23 which is with the antitrust authorities.

1                   MR. RILL: What I'm hearing you say, then, it's the policy litmus  
2 through which basic facts are passed rather than the ability to find basic facts,  
3 that makes you think that ITC may be a preferable organ for fact finding.

4                   MR. PADILLA: For fact finding of this type, yes, I think so. We  
5 had a tremendous amount of difficulty in outlining the overall nature of the  
6 scheme in the film case when we met with the Justice Department. We got  
7 questions back that suggested that the attorneys there were taking a look at this  
8 in individual pieces, in a smokestack slice of each piece, which again that's not to  
9 fault them. That's the way they come at these things and that's the historical way  
10 in which antitrust law is practiced.

11                   When you get into an area like Japan, though, we have found that  
12 that may not be fully descriptive of what's going on in the market.

13                   MR. RILL: Okay. I gather what you're saying is that it's not the  
14 ability to find facts A through Z, it's the way that facts are looked at --

15                   MR. PADILLA: Are interpreted, yes.

16                   MR. RILL: -- that makes you think that ITC is a preferable  
17 agency. Well, you're certainly clear about it.

18                   Steve, thanks for your testimony. I think everyone would agree, I  
19 think in fact the Japanese government representatives in conversation with me  
20 have agreed, that one of the real problems of exercising positive comity is that  
21 there's simply historically a different threshold, not merely to find a violation,  
22 but a different threshold, a much higher threshold, for the JFTC to even initiate a  
23 serious investigation, which creates a real dilemma.

1                   We've heard "bring us the facts and we'll start an investigation,"  
2 but the level of facts that are required to start an investigation are the sort of  
3 facts that in the United States would probably start a consent negotiation. And I  
4 think that's conceded.

5                   Now, as you pointed out, there is an agreement that's been  
6 announced and soon to be executed. Is it possible that through the exercise of  
7 positive comity under that agreement with some level of transparency that  
8 perhaps the Department of Justice can bring that threshold down and induce the  
9 JFTC to be more aggressive in conducting investigations? And isn't that  
10 agreement something that can be used as a tool in addition to, as I understand,  
11 your view of enforcement?

12                  MR. FARRAR: We're very hopeful that the agreement will bring  
13 the threshold down. For at least two years now the Japanese government has  
14 been saying that to us: Bring us the facts and we'll investigate them. The catch  
15 is that we're not in any position to discover the facts. And it's going to take a  
16 discovery process that, if it doesn't equal the Antitrust Division's normal  
17 standards, at least approaching them, I think, to uncover the facts in Japan.

18                  I'm confident that they're there, but it's not in our power to  
19 discover them. But I'm very hopeful that the joint agreement will produce that.

20                  MR. RILL: I think that both the government of the Japan and the  
21 government of United States have a good bit at stake in this agreement, and that  
22 more transparency could be evoked under the agreement and a greater sense of  
23 ability, willingness on the part of the JFTC to use what investigatory powers it

1 has.

2 I certainly can't disagree with you, by the way, that footnote 159  
3 should have been erased. And the enforcement, the maintenance of that  
4 unilateral enforcement tool is quite important in the final analysis.

5 Mr. Stevenson, what is the exact status of the DG-IV? Two  
6 questions: What is the exact status, if I can tell me, of your DG-IV complaint?  
7 And have you asked DOJ or FTC for positive comity in support of your  
8 complaint?

9 MR. CALAMARO: The status, Mr. Chairman, in DG-IV is that the  
10 complaint was filed in July of '94, and the Commission has not yet initiated an  
11 investigation, but it hasn't terminated it. It hasn't responded to the petition.

12 MR. RILL: But there's no statement of objections, if you can tell  
13 me?

14 MR. CALAMARO: There have been -- there have actually been a  
15 rather confusing number of letters from the Commission.

16 MR. RILL: But no formal statement of objections at this point?

17 MR. CALAMARO: Not that I'm aware of, no. But the Commission  
18 has actually notified UPS several times of the grounds on which it prefers to  
19 proceed, and that's changed a couple of times, whether it's on articles 85 and '6,  
20 or articles 92 and '3.

21 UPS then brought an action under the Commission's rules to  
22 compel the Commission to act under 175, of the EC Treaty, and that's actually  
23 pending now.

1                   MR. RILL: I see. My second question, have you asked the  
2 Department of Justice or the FTC to invoke positive comity under the 1991  
3 agreement?

4                   MR. CALAMARO: We'll do that tomorrow. I thought we'd come  
5 here first and tell you about it.

6                   MR. RILL: Pardon me?

7                   MR. CALAMARO: We'll do that tomorrow. We thought we'd  
8 come here first today.

9                   MR. RILL: I'm not advocating it. I have some interest.

10                  MR. CALAMARO: That was our plan.

11                  MR. RILL: But the agreement's been in place since '91 and was  
12 updated last year, and apparently has been invoked with some lack of success by  
13 Kodak. But on the other hand, if you looked at the testimony before Senator  
14 DeWine, there have been some examples of some modest progression in that area.  
15 If you're asking for action, why, you might want to take a look at that. And that's  
16 not a recommendation. That's simply a question.

17                  MR. CALAMARO: Mr. Chairman, that's actually what UPS is  
18 considering very seriously doing. But fact is that until recently it wasn't so clear  
19 that the Commission wasn't going to proceed on this. They could have dismissed  
20 it a long time ago. They could have rejected it, but they didn't.

21                  We think they want to do the right thing and they will do the right  
22 thing. So I think that, to summarize a long story, UPS has been reluctant to try to  
23 bring other remedies. But I think we're going to help the Commission by asking

1 our government to agree to invoke positive comity.

2 MR. RILL: That's all I have.

3 DR. STERN: Merit.

4 MS. JANOW: Well, I too would like to indicate my appreciation to  
5 those speaking on this panel. As Committee members have reiterated, we have  
6 wanted very, very much to be hearing not only from business associations but  
7 individual businesses that are experiencing difficulty. So I really do appreciate  
8 your written and nuanced statements.

9 Please take a minute to speak further on the WTO issue because  
10 that's a very live one also. In particular, it seems that much of the debate, at least  
11 between the United States and the EU, who have formally officials debate the  
12 role of the WTO, turn on what role for dispute settlement. And you've indicated  
13 your low expectations not only coming out of WTO, that has no positions on  
14 competition policy, but a generalized statement about WTO's fact-finding, et  
15 cetera, capabilities.

16 I think, Steve, you weren't speaking so much to that issue of the  
17 WTO. But I wanted to at least ask you -- and I think maybe this is more directed  
18 at Chris. You suggested one shouldn't look to the WTO because it's there, but  
19 one often hears that it is the only inclusive body of the countries that have  
20 experience and don't have experience.

21 So my question to you is would you feel differently about a  
22 continuation of a work program or deliberations on the role of competition policy  
23 in trade, that kind of ongoing work program within the WTO, as an educative

1 function separated from dispute settlement and somehow useful to development  
2 of a competition culture? Or do you think unilateral measures, enhanced, are  
3 going to get us there?

4 MR. PADILLA: Well, I think certainly we're not opposed to  
5 educating developing countries about competition policy. And in fact, a number  
6 of the academic writers on this point have said that one of the valuable points,  
7 even if we get a least common denominator kind of agreement, is to bring many  
8 of the developing countries up to at least a bare minimum standard with regard  
9 perhaps to cartel-like behavior. And certainly that's a laudable goal.

10 But I have to say when we look at the issue of trade and  
11 competition policy from the point of view of the economic interests of American  
12 companies, we're talking principally about Europe and Japan. I don't see that it  
13 would help many of us very much to spend the next five to ten years in a WTO  
14 round advocating a competition law for Bolivia while nothing is done about  
15 Japan.

16 The problem is, in our view, Japan. We've got a positive comity  
17 agreement with Europe. It's had some success. You've got a DG-IV and a DOJ  
18 that come at this from roughly similar perspectives. In Japan you've got an  
19 economy that is grounded on a fundamental fear of competition. And I would  
20 refer you to Michael Porter's article in the current edition of Foreign Affairs,  
21 which I thought was very well done.

22 Competition in Japan is viewed as something to be managed and  
23 constrained because it's harmful, it creates disorder. So the question is would a

1 WTO negotiation do much to improve the situation of market access in Japan,  
2 and I think the answer is no, because we wouldn't get the high standards  
3 necessary to get at the very complex kind of barriers that Steve mentioned, and  
4 even if we got them, as we talked about the dispute settlement, how do you  
5 enforce it?

6               So my view is we've got a clear problem here and the best answer is  
7 until something else comes along a unilateral approach that involves using  
8 existing authorities under existing law, with some tinkering to compel the use of  
9 that authority a little more vigorously than it's been used in the past.

10              DR. STERN: Further?

11              MS. JANOW: No, I just wanted to invite anyone else to speak on  
12 that.

13              DR. STERN: Let me follow up on the line of questioning that Jim  
14 was pursuing with you, Chris, about the fact finding capacity somewhere. You  
15 suggested the International Trade Commission and Jim was asking you about the  
16 Justice Department, and he was asking you what it was in terms of the capacity to  
17 analyze this information, was the capacity there? Yes, the capacity is there, but  
18 the analytic mind set was different.

19              I would suggest that there may be other reasons why maybe  
20 subconsciously or subliminally you might be suggesting the ITC.

21              MR. PADILLA: Or USTR.

22              DR. STERN: Or USTR. Well, let me focus on the ITC, but then  
23 you can tell me how the USTR may be --

1 MR. PADILLA: I put ITC first in deference to you.

2 DR. STERN: Oh, I see. So, that was the reason. So that was the  
3 subliminal. Well, thank you. I'm flattered.

4 But the ITC is nonpartisan.

5 MR. PADILLA: Yes, indeed.

6 DR. STERN: It is made of up of appointees who can't be removed  
7 from office if somebody doesn't like the decision.

8 MR. PADILLA: Right.

9 DR. STERN: They may get shot in the back later, but that's  
10 something else. And they do have a staff of approximately 450 who do analyze  
11 industries from a variety of perspectives. They do have hearings.

12 MR. PADILLA: Indeed.

13 DR. STERN: And they have hearings which are transparent, they  
14 have records, and they make decisions which are published and are available so  
15 that one knows, and they have deadlines. Those may be other factors which are  
16 procedural, which might be useful cues for how the Justice Department in  
17 exercising its positive comity might give greater confidence to individual  
18 businesses such as yours.

19 MR. PADILLA: Yes. I think you've hit it right on the head. And  
20 many businesses have experience in dealing with the ITC from a dumping point  
21 of view, of course, and all of those procedures are well understood, well  
22 documented. You make your case, you win, you lose, it's fairly clear. The  
23 standards are fairly clear.

1           There also is in that agency, as well of course in USTR, an  
2 understanding of the historical nature of some of these things. When we go to  
3 the ITC or the trade representative and we talk about exclusive distributor  
4 agreements in Japan or pressure on retailers not to carry foreign products and not  
5 to discount them, we get nods of understanding because not only do they  
6 understand it, they've heard it, not only from the film people but from the glass  
7 people, the semiconductor people, the auto people, or any one of a number of  
8 industries.

9           Our experience, at least, and maybe we were just the victim of bad  
10 timing when we went to the Justice Department, was that we got: Okay, well,  
11 let's forget about all this other stuff. Let's break it into this one piece. Show me  
12 the specific harm to Kodak from sharing of disaggregated data among four other  
13 companies.

14           Well, then you get into a highly legalistic question and you lose the  
15 overall picture, which is you've got four major Japanese companies sharing  
16 production data and also happening to control 90 percent of the market. So that's  
17 why we have suggested and others on the Hill have suggested that maybe we need  
18 to inject another view, not to take away the authority of the agencies to enforce  
19 competition laws, but to inject another view, and I think that's why we've  
20 suggested that.

21           DR. STERN: What I was suggesting -- and we can have this  
22 discussion later; this is not a question -- was that there may be procedures that  
23 might be attached to existing authorities. In other words, so --

1 MR. PADILLA: You may not need to do that.

2 MR. RILL: I think this is one to discuss later, but the question is  
3 whether an investigatory proceeding or an adjudicatory proceeding should be  
4 held in public, and that creates a lot of controversy. I don't think many  
5 companies would want have a public investigatory proceeding, domestically or  
6 foreign.

7 DR. STERN: But they might want more transparency in the  
8 outcome.

9 MR. RILL: In the outcome, absolutely.

10 DR. STERN: Right.

11 MR. RILL: Absolutely. Let me suggest that -- I'm not here to  
12 wear my old school hat, because I didn't wear it all that long, but if Justice was  
13 asking for the effect on Kodak, it may be because of the limitations of the  
14 Foreign Trade Antitrust Improvement Act, which requires a showing of direct,  
15 substantial and foreseeable effect on the foreign commerce of the United States.

16 So they may have been bound by their statute, and I don't hear you  
17 saying you want to change the statute.

18 MR. PADILLA: No, because I think one could look at that statute  
19 and interpret that a disaggregated price fixing scheme that we believe had the  
20 effect not only of fixing prices but of excluding price competition from Kodak,  
21 did impede on the foreign commerce of the United States. So I guess the  
22 question is who makes that interpretation?

23 We certainly felt and certainly there was a Section 301 finding in

1 which the Justice Department concurred, I might add, that there was an  
2 unreasonable burden on U.S. commerce. Yet when we got down to the specifics  
3 and it came down to an interpretation of did this disaggregated data scheme  
4 impinge on the foreign commerce, they came to a determination that they couldn't  
5 find it or they couldn't find enough to make a referral. And that's where we  
6 disagree.

7 MR. RILL: Our executive director reminds me quite correctly that,  
8 on top of that, positive comity doesn't require each and every element of the  
9 Foreign Trade Antitrust Improvement Act to be in place before we, our  
10 government, makes a suggestion for enforcement by another government. So I  
11 will retreat a little bit from my point.

12 MR. PADILLA: And I should say, we went to the Justice  
13 Department after the WTO case had been decided, and I should think that that  
14 may have had an impact as well on their willingness to throw themselves into the  
15 fire on this one, and perhaps that's the accident of timing. We had terrible timing  
16 throughout this case --

17 MR. RILL: Well, we can't address that.

18 MR. PADILLA: -- from the first day it was filed. But perhaps,  
19 then, our colleagues at Guardian will have better success, and I honestly hope  
20 they do, because their circumstances are very similar to ours, and perhaps the  
21 recent agreement and the profile that the Congress has put on this will wind up  
22 with a better result. I hope so.

23 MR. RILL: And I think the agreement may be a timing issue that,

1 not specifically referring to the Guardian case, but to situations of that sort, that  
2 could make use of positive comity very propitiously with Japan. That's a  
3 personal view, not a Committee view.

4 DR. STERN: Okay. Why don't we take a break and resume at  
5 4:00. We're running late now. Five 'til 4:00. Five 'til 4:00.

6 (Recess.)

7 DR. STERN: Now, shall we begin. This is the last session of the  
8 day, and we are honored to have representatives talking on institution building  
9 and competition law advocacy. We have professors -- no, I'm sorry. It has been a  
10 long day. We have no more professors. Yes, we have no professors. I suspect  
11 they come in and out. Ex-professors. Yes, right, revolving door. How could I  
12 tell? Excuse me.

13 (Laughter).

14 We shall hear from Richard Gordon and Mr. Khemani and Ms.  
15 Simmons, in that order. Would you wish to begin, Mr. Gordon?

16 MR. GORDON: Sure. I'll probably be fairly brief.

17 DR. STERN: Representing the International Monetary Fund.

18 MR. GORDON: And particularly with respect to saying  
19 representing the International Monetary Fund, I represent, I suppose, only myself  
20 here. We have quite a thing at the Fund where you have the Fund itself, and only  
21 the Executive Board -- through decisions -- can speak for the Fund, and then you  
22 have staff opinion and that opinion has to be cleared by very many different  
23 departments etcetera. And then you have an individual staff member like myself

1 who's giving his views.

2 I'm from the legal department of the Fund, which is quite small.  
3 We have I think probably 26 lawyers right now. Before I get into talking about  
4 the specifics of the Fund's role in competition law, I might just say that over even  
5 the past four years, which is as long as I have been at the Fund, the requests to  
6 the Fund to assist, shall we say, in legal development in various countries of the  
7 world has grown more than exponentially.

8 I think, something that can be seen most recently with the Asian  
9 financial crisis, that there has been a correct perception that one of the big  
10 difficulties in that particular crisis was not just typical macroeconomic errors,  
11 put it that way -- deficit spending, for example -- and that there have been some  
12 very serious fundamental problems or structural problems in laws and in legal  
13 institutions that carry out laws. And as that, as I say, correct perception has  
14 developed and really been shown to be the case in Korea and Indonesia and in  
15 Thailand, etcetera, and I guess in Brazil as well, and certainly in Russia, the  
16 Fund has been called upon to play a greater role in these areas.

17 The Fund has been traditionally involved in macroeconomic policy.  
18 As I was just saying to Professor Dunlop, the Fund is a very large collection  
19 primarily of macroeconomists, whose training involves macroeconomic policy  
20 and spreadsheets. Turning to the development of laws or the review of,  
21 recommendations of and development of laws and institutions to implement those  
22 laws, is a fairly new thing and very difficult for macroeconomists.

23 If I can go back to my first statement, I think we have 25 or 26

1 lawyers in our department, although we do have consultants who come in. That  
2 is a long way of saying that much of the specifics we do we turn over to the  
3 World Bank, where there are considerably more staff of a great variety of  
4 expertises and a very large legal department that is more used to doing this kind  
5 of more specific detailed work on laws and legal development and institutional  
6 development.

7               That being said, let me just give a quick overview of what the Fund  
8 does with respect to, say, policy advice. One is that every member of the Fund --  
9 I think it's now 183 or 184 countries -- goes every year, pretty much, through  
10 something called the Article IV consultation. An Article IV consultation is  
11 where a team of economists go off to the country and they review the books,  
12 basically. They look at what's going on at the central bank, what's going on with  
13 respect to the central budgetary policy, and they come up with a report. It's the  
14 Article IV consultation report.

15              Going back to the few number of staff, the large number of  
16 countries doing this every year, what can be examined in this annual review  
17 process for every country is pretty limited. And since they're all  
18 macroeconomists, pretty much who do this work, review of legal issues is  
19 necessarily somewhat -- I don't want to say superficial, but it is limited because  
20 of resources.

21              The second thing that the Fund does, which is much more popular  
22 -- in the popular imagination, is to lend money to countries, which it does under  
23 the rubric of conditionality. The Fund creates conditions which the country must

1 fulfill before they can get their loan, in essence. Of course, the system at the  
2 Bank is similar, but I'll leave my colleague to describe that.

3           In the area of Fund conditionality, I think that this is probably what  
4 most people here would be primarily concerned about. At least that has been my  
5 experience in speaking with people in the past on not just competition law, but in  
6 other areas of the law, e.g. bankruptcy law, as I was discussing earlier, where it  
7 seems that the Fund has some sort of cudgel that it can beat members over the  
8 head with and say: Only if you adopt these appropriate policies will you get  
9 money. And whereas certain countries can jawbone with other countries about  
10 adopting appropriate policies -- the Fund can as well during this Article IV  
11 consultation procedure -- it is only through conditionality that there is really a  
12 lever, a way of influencing countries quite directly to adopt particular policies,  
13 including competition policies, for example.

14           However, again given the limited staff and the general nature of  
15 the training of staff, which is macroeconomists, even in the area of Fund  
16 conditionality, there is a limited amount that the Fund can do with respect to  
17 something as complex as competition law.

18           Now, if you look at competition policy broadly defined, which  
19 would be looking at sort of broad-based macroeconomic structural changes such  
20 as free trade, privatization, to a certain extent foreign direct investment --  
21 although the Fund's Articles limit its conditionality with respect to foreign direct  
22 investment, in that freedom to impose capital controls is a right guaranteed by  
23 the Fund's Articles -- the Fund has traditionally played quite a role.

1                   But in recent times where aspects such as the enactment of a  
2 appropriate antitrust or competition law become more and more important, it  
3 would be very difficult for the Fund to design with any kind of great detail  
4 policies with respect to something like competition law. It is really not  
5 something that the Fund has had a tremendous amount of experience with,  
6 although it is one of many things that countries are interested in, that the Fund's  
7 shareholders are interested in, of which the U.S. is the largest and most  
8 influential.

9                   The U.S. has recently, in the latest amendments to the Bretton  
10 Woods Act, that provides for the most recent increase in the U.S. quota to the  
11 Fund, listed a number of areas that the U.S. Congress was interested in the Fund  
12 becoming increasingly involved in with respect to conditionality. Again,  
13 bankruptcy I think was the most prominent. But it's very difficult for the Fund to  
14 be involved in any great detail.

15                  Now, I would step back, and I'll speak for only two more minutes.  
16 Prior to coming to the Fund, I was at Harvard Law School and I had worked with  
17 the Harvard Institute for International Development in working on a competition  
18 law for a particular country whose name I will not mention, with a broad group of  
19 consultants. Over the years we had, I think, perhaps 11 or 12 people working on  
20 this.

21                  I spent the better part of four summers and some other times in  
22 Jakarta, getting to know the language, the laws, pretty much everything, and to  
23 draft a competition law for a large country that had a complex, shall we say, legal

1 and social environment was extremely difficult.

2 In fact, one of the things we were most concerned about was that  
3 we would create a law that would be actually be used to suppress competition or  
4 against a particular dominant cultural or religious minority, and that became a  
5 very difficult thing. But we had lots of staff, lots of time, lots of expertise.

6 Later on there was a condition, I think probably appropriate, in the  
7 Fund-supported program for this country that involved the adoption of an  
8 appropriate competition law. I think that was relying on the general view that a  
9 competition law was needed.

10 Frankly, I think that there was some word from some of the  
11 shareholders at the Fund that there were political constituencies that were very  
12 interested in a competition law. And finally, our colleagues at the World Bank,  
13 who had greater specific expertise in this area, wanted to play a role with the  
14 Fund in designing the conditions. And eventually a competition law was  
15 adopted, and I hope it was an appropriate one.

16 But that's just a brief overview. I hope I haven't said so much that I  
17 will get in trouble with my management. Let me turn it over to my colleague  
18 from the Bank.

19 MR. KHEMANI: Thank you.

20 Like my colleague, I speak in my personal capacity. However, my  
21 lead responsibility in the World Bank is related to private sector development  
22 and of that competition law policy and competitiveness policies is one of the  
23 cornerstones. So while I'm speaking in my personal capacity, with all modesty I

1 can say that the approach that I'm going to describe is basically the approach that  
2 the World Bank Group has taken into account as part of its policies.

3           Let me just backstep a bit and remind people that the objective or  
4 the primary goals of the World Bank are poverty reduction and sustainable  
5 economic development. What our experience over the last few decades has  
6 shown is that private sector-led economic growth is much more sustainable, much  
7 more rapid, than when you have the public sector playing the lead role in an  
8 economy. And indeed the events of the 1990's has proven that to be the case even  
9 more so.

10           The Bank likes to identify sets of policies as first and second  
11 generation. The first generation policies relate to macroeconomic policies, fiscal  
12 and monetary along with the IMF, but also trade and investment liberalization.

13           But the second generation of policies now relate to the way more  
14 markets work, and competition and regulatory policies in particular. Now, in the  
15 Bank/Fund division of labor, the Bank does take lead responsibility in the area of  
16 competition law-policy, but also in a number of other related areas, including  
17 bankruptcy and corporate governance as well, though the Fund has recently done  
18 some very commendable work in that area in the context of fostering economic  
19 restructuring in economies that are financially dispaired.

20           The Bank is a bank. Many times people tend to forget that the  
21 Bank is a bank. They think that it's a foundation, a university, a grant-giving  
22 authority. But actually the Bank is a bank and it makes loans. Indeed, most of  
23 our income and our sustenance as an institution come from the interest income

1 that we earn from our loans.

2                   However, we attach conditionalities to those loans and sometimes  
3 the conditionalities relate to the provision of structural assistance. So like any  
4 other good banker, if you're making a loan to a corporation you might want to  
5 have either a seat on the board of that corporation or you may want to have an  
6 oversight committee to see that that corporation is using the funds appropriately.  
7 That's our analogy or parallel with respect to the conditionalities that are put in.

8                   We do not have an Article IV country-by-country review like the  
9 IMF, but we are now are embarking upon what is called a Comprehensive  
10 Development Framework, where we will be systematically assessing the market,  
11 but also other elements of the development framework that an economy has, and  
12 help those countries to try to formulate a strategy. And of those, the area of  
13 market support institutions and competition law-policy are very critical elements.

14                  Well, our approach to competition law-policy. Well, firstly we  
15 view that as a framework policy. Increasingly we are arguing that it should be  
16 viewed as the fourth cornerstone of government framework policies, the other  
17 three cornerstones being monetary, fiscal, and trade, and so competition should  
18 be viewed as the fourth cornerstone.

19                  We think that a competition law-policy should be one where it's a  
20 general law or general policy of general application which applies to state  
21 enterprises as well as to the private sector. Hence, the submission that UPS made  
22 earlier regarding to, albeit in Germany rather than in a developing country, about  
23 state enterprises using their position to undermine competition is very relevant to

1 the work that we do in developing countries in the context of competition law-  
2 policy.

3           The objective there is, of course, to foster mobility of resources.  
4 We believe that competition would lead to more flexible, adaptable dynamic  
5 markets. I think the proof of the pudding is somewhat evident from the East  
6 Asian crisis. Economies which have had more flexible and open markets have  
7 tended to fare much better in their recent economic crises than those that have  
8 had fairly closed or restrictive types of business arrangements.

9           Hong Kong, Singapore, Taiwan, for example -- being flexible, open  
10 economies where they foster a lot of competition in their domestic markets --  
11 have fared much better than Thailand, Indonesia, or Korea and, indeed, Japan,  
12 though that's not one of our crisis countries, as such.

13           However, I want to point out that one can have competition and  
14 competitive markets without having a competition law. Passing a competition  
15 law does not necessarily guarantee competition. However, what we do find is  
16 that those economies that are evolving and fostering more competitive markets,  
17 we try to remind them that having a competition law safeguards the competitive  
18 process.

19           And of the flexible economies that I just mentioned, Hong Kong  
20 and Singapore, for example, do not have any competition laws. Of course in the  
21 English common law tradition, they do have various clauses that can get at  
22 competition problems. Taiwan has an effective and very vigorously applied  
23 competition law. What is interesting is that, oh, about six or eight weeks ago the

1 Herald Tribune carried an article about the financial-industrial complexes that  
2 are emerging in Hong Kong and are engaging in various kinds of restrictive  
3 practices, particularly in the areas of non-tradables. So when you're in industrial  
4 development and you don't have access to capital but are competing with an  
5 integrated financial industrial company, you find that you're at a disadvantage.  
6 So, hence, the Hong Kong Consumer Council has been advocating a competition  
7 law for that jurisdiction.

8               Again, to prove the point that by having a competition law does not  
9 necessarily guarantee competition, one has only to look at Latin America.  
10 Indeed, many of the Latin American countries have an à la Sherman Act type  
11 provision embodied in their national constitutions and have had so since the turn  
12 of the century. But only recently have they started embracing competition policy  
13 in a more serious way.

14               Well, the objectives of the competition law policy that we try to  
15 foster is that it should be an efficiency, consumer welfare oriented law, mainly  
16 on the argument that, even though many developing economies have to balance a  
17 wide range of socio-economic-political issues, we feel that it's not that those  
18 socio-political issues are not important, but that it's better to have those issues  
19 addressed by separate instruments and to have competition law address,  
20 primarily, issues of market efficiency and consumer welfare.

21               So if one is interested in regional development or maintaining  
22 employment, enact separate policies, have separate instruments, rather than have  
23 a competition agency pursue -- like many industrial jurisdictions -- the UK, the

1 European Union in particular -- which pursue a public benefit or public interest  
2 approach. And that often requires a balancing of various objectives which often  
3 lead to inconsistencies in policy application or lead to other types of conflicts.

4           Most of the laws that we have actually worked on are sort of  
5 mainstream laws which have provisions dealing with structure, namely those of  
6 abuse of dominant market position, monopolization or monopoly, as well as  
7 mergers and acquisitions. And then of course they have conduct-oriented  
8 provisions dealing with price fixing, various kinds of anticompetitive practices  
9 that emanate, like exclusive dealing, et cetera.

10           We recognize that the institutional capacity, in terms of the way  
11 the institutions are structured but also the way they're staffed, is a major  
12 challenge for many developing countries. And it's going to take them quite a  
13 while before they can achieve the level of competence and sophistication that  
14 effective implementation of competition law requires.

15           We're also dealing with economies where competition is not  
16 necessarily widely understood or there's no popular support for competition. So  
17 we generally try to suggest that the new agencies or government ministries or  
18 parliamentarians who are trying to push forward this type of agenda engage a lot  
19 on what we call competition advocacy. Particularly in educating the general  
20 population about the merits of competition, the fact that competition is not  
21 something that is culturally alien.

22           Indeed, many times in many economies we hear the argument, well,  
23 this is an à la western industrial developed country approach. It is culturally

1 alien to us. For example, in Indonesia some of the senior ministers that I met  
2 would say, "We are not a litigious society; we are a consensus-oriented society, a  
3 cooperative society."

4               Well, since I'm speaking in my personal capacity I can just say that  
5 most of this is really excuses for corruption and bribery and hiding or  
6 maintaining their rents. I do not know of any cultures, and having grown up in  
7 five continents and then traveled in I don't know how many countries throughout  
8 my life before even joining the World Bank, I don't know of any culture which  
9 says that engaging in price fixing, monopolization, et cetera, is to be looked upon  
10 favorably. Whether it is Judaism or Christianity or Buddhism or any kind of  
11 religious following, I do not know of anybody saying monopolistic exploitation  
12 is good.

13               So that gets me to: How do we then try to foster this kind of  
14 understanding? Well, one of the arguments that I've increasingly been adopting  
15 is: Why not just have competition in your domestic market to start off with?  
16 When one looks at the evolution of U.S. or Canadian or most industrial country  
17 competition laws, this was in an era before international trade was really taking  
18 place extensively. It was the fostering, maintenance and encouragement of  
19 competition in the domestic market which was the focal point of most antitrust  
20 enforcement.

21               So the argument that I advance is: Just foster competition in your  
22 own market. Give your own young people -- the young Indonesians, the young  
23 Thais -- an ability to participate in the market, to be able to benefit from their

1 own entrepreneurship and risk-taking. Why would you want to erect various  
2 kinds of barriers on the argument this is a western industrial development  
3 country ideology and we don't need to apply it over here, or that we are such a  
4 cooperative society, don't worry, big brother will look after you, which doesn't  
5 happen to be the case.

6           The critical area of the interface between competition law policy  
7 and other government policies certainly lies in the area of trade and investment  
8 policy. For example in Korea. Notwithstanding the fact that Korea did have  
9 prior to the crisis low tariff rates and allegedly open policies of various kinds,  
10 when one did a detailed analysis one found that there were various non-tariff  
11 barriers to trade. But in addition to that, there were various investment  
12 restrictions. So it made barriers to entry very high for new investors to come in.

13           During the crisis, of course, there was a change of regime and Kim  
14 Dae Jung understood and appreciated the merits of fostering a more open and  
15 truly effective competitive market environment, and one can see that the Korean  
16 economy is reviving much more rapidly than many of the other economies.

17           The other area of interface between competition law policy is in  
18 the area of regulatory reforms, especially privatization of utilities, power,  
19 telecom, water, sanitation. This also very much fosters market development.  
20 When one looks at the market capitalization of many of the newly emerging  
21 capital markets, one finds that more than 50, 60, even as high as 70 percent of the  
22 total market capitalization lies in newly privatized utilities and telephone  
23 companies, et cetera.

1                   So this is a way of widening ownership in an economy, and also  
2   fostering capital market development. Of course, this also means that one has to  
3   have an effective regulatory framework in place, one which fosters competition.  
4   And indeed the developments in industrial organization theory and in technology  
5   make this much more possible, that the old arguments for having natural  
6   monopolies and having the heavy-hand-of-government ownership or regulation  
7   become less tenable these days.

8                   In our work on competition law policy, we face a number of  
9   challenges. Notwithstanding the fact that my colleague thinks that in the World  
10  Bank we have many more resources, I would like to point out that my unit  
11  consists of 12 people. And there are only 2 of us who have actually had hands-on  
12  experience in competition law-policy, having worked in antitrust agencies or  
13  have done consulting and advisory work in that area.

14                  In the past six years that I've been at the Bank, we have been  
15  involved in more than 20 countries in actually helping them draft and develop  
16  competition laws. Many times we do look to U.S.A.I.D. funding, but I must  
17  confess that we have not been able to find a focal point in U.S.A.I.D. on  
18  competition law.

19                  MS. SIMMONS: Here's my card.

20                  MR. KHEMANI: Maybe today when I meet Ms. Simmons I will  
21  now have a number to call on. So that is -- we try to do bilateral twining  
22  arrangements with the Germans, we try to do that with the Canadians, the  
23  Australians and whoever we can, including Harvard University.

1           But it is an uphill battle. And resources are constrained. And the  
2 only way one can foster this policy, which I think is ultimately -- notwithstanding  
3 what the gentleman from Kodak said earlier, that he did not see this as being high  
4 priority on their agenda, that really Europe and Japan were their issue, I think  
5 that's a very myopic opinion. Because if you don't address these issues in the  
6 context of China and India, for example, then you're denying yourself access to  
7 major, huge markets.

8           And indeed, this kind of argument I heard from Ford Motor  
9 Corporation when I was advising them on their Ford 2000 initiative.  
10 Subsequently they changed that, because they found a tremendous potential for  
11 U.S. trade and investment. And I'm not a proponent for U.S. trade and  
12 investment, but I think that by adopting competition law-policy one is fostering  
13 greater accountability, transparency, and also promoting market access.

14           So competition, trade and investment really go hand in hand.  
15 Thank you.

16           MS. SIMMONS: Thank you. I too am pleased to have been asked  
17 to join this hearing of the International Competition Policy Advisory Committee,  
18 and I'd like to speak about the U.S. Agency for International Development. I'm  
19 going to call it "USAID," which is kind of the acronym that we use to make "U.S.  
20 Agency for International Development" slightly less of a mouthful.

21           So USAID, or U.S.A.I.D., is in fact the bilateral agency which  
22 provides U.S. government assistance to developing countries and transitional  
23 countries. We now have operations in slightly over 70 countries around the

1 world. We are principally a grant-making organization, that is that the resources  
2 that we expend in partnership with universities, with private sector business  
3 companies and so forth, are made on a grant basis.

4 I'd like to address four points in my brief remarks and I think they  
5 respond to the Committee's questions that were asked in the letter, but simplify it  
6 slightly. And I'd be glad to answer any follow-up questions either now or after  
7 the hearing if you'd like.

8 But I'd like to address: first, how support for developing  
9 competition policy and law relates to U.S.A.I.D.'s strategic goals and objectives;  
10 second, how U.S.A.I.D. makes its specific decisions to provide support to the  
11 development of competition policy and law; third, what have been the impacts of  
12 this assistance so far; and fourth, some of the future activities that are envisioned  
13 by our agency.

14 Returning to the first point, how competition policy relates to  
15 U.S.A.I.D.'s strategic goals and objectives: Obviously, as an independent agency  
16 of the U.S. Government these days, we are bound by the rules of GPRA, as is, I'm  
17 sure, the Department of Justice. And we have identified our six strategic goals  
18 and committed ourselves to their pursuit through the expenditure of both  
19 financial resources and personnel resources.

20 The six goals are: the promotion of broad-based, sustainable  
21 economic growth in developing and transitional countries; the strengthening of  
22 democracy and good governance; the development of human capacity through  
23 education and training; the stabilization of world population and protection of

1 human health; the protection of the world's environment for long-term  
2 sustainability; and saving lives in the event of natural and man-made disasters.

3           Clearly, it is the first of these goals that I'm going to address. The  
4 agency as a whole is principally organized across geographic lines. However,  
5 The Global Bureau (in which the Center that I direct, the Center for Economic  
6 Growth and Agricultural Development is located) is organized in a way which  
7 reflects the goals of the agency.

8           We have prepared a strategic plan which says that one of the keys  
9 to such broad-based sustainable economic growth is a policy environment that  
10 promotes efficiency and economic opportunities for all members of society. To  
11 us, this kind of policy environment is one that is market-oriented and open to  
12 external investment. It is also one in which there is a rule of law, substantial  
13 transparency in both public and private transactions, and the governors are  
14 accountable to the governed for decisions made on their behalf.

15           So competition policy is clearly one element of the kind of policy  
16 environment that we seek to promote. Competitive private markets are the most  
17 efficient way that we know of to protect both producers and consumers' rights,  
18 and the establishment and growth of competitive, successful enterprises is the  
19 best way that we know to ensure sustainable increases in economic opportunity.

20           So it is no surprise that U.S.A.I.D.'s programs and activities  
21 frequently support policy, legal, and, I would emphasize, institutional reforms  
22 focused on removing the impediments to the expansion of competitive trade and  
23 investment as well as in the strengthening of the private sector.

1           The kinds of activities that we support range from short term  
2 technical assistance -- in which, for example, American legal experts work as  
3 consultants to a host country counterpart to draft new laws for a period of two  
4 weeks, three weeks -- to something which we call training and capacity building,  
5 which may be implemented over a period of months or years to enable local  
6 experts to acquire the specific expertise that they themselves need to develop  
7 local policies and laws, perhaps along the lines that Richard Gordon was  
8 remarking about in Indonesia. And then, thirdly, we support more complex  
9 programs in which we try to address a range of issues and utilize a range of  
10 advisors with different backgrounds and expertise. In these programs, policy  
11 development, training, analysis, institutional development, legal and regulatory  
12 work are carried out by a mix of individual consultants, institutional consultants,  
13 other experts from the U.S. government, and so forth.

14           With that background, then, how do we in U.S.A.I.D. decide to  
15 support such policy and legal reform activities, particularly with regard to  
16 competition policy? We who work in U.S.A.I.D.'s Washington offices do some  
17 program development and management. But the most important program  
18 development work in all areas is done in partnership with people in developing or  
19 transitional countries in which the agency has resident offices, which we call  
20 missions, which is very unlike the World Bank, in which temporary touring  
21 groups of macroeconomists are called missions. We call our permanent groups in  
22 countries missions.

23           Similarly, unlike the IMF and the World Bank, most of our

1 program staff in fact is resident overseas, not in Washington, which explains why  
2 it's difficult often to find the point of contact in Washington for specific  
3 activities. In general, USAID's programming decisions are made at the country  
4 level, taking into the account the overall strategic goals of the agency and even  
5 larger foreign policy considerations, but specifically taking into account the  
6 particular situation in that country at that time.

7               Strategic plans for the provision of U.S.A.I.D. assistance are  
8 prepared every three to five years for every country in which we have a mission  
9 and generally involve five factors: extensive consultation with the government  
10 of the host country; extensive consultation with various stakeholder groups in the  
11 country, including the private sector; sector or problem-specific analysis;  
12 discussion with other donors; and discussion with American groups both in that  
13 country and in the U.S. who may be interested in that country, for example, the  
14 large group of Armenian-Americans who are very concerned about what happens  
15 in Armenia.

16               Of the approximately 70 country assistance programs that  
17 U.S.A.I.D. manages, nearly 100 percent have identified the development of  
18 competitive markets, the privatization of state enterprises, or other areas of  
19 economic growth as a strategic objective for that country assistance program.  
20 And fully half of these programs have also identified legal and institutional  
21 reform as an important element of their program to meet the strategic objective  
22 they've identified. Of these legal and institutional reform programs,  
23 approximately half have specifically noted increasing competition as an

1 important expected outcome of the legal reform programs that are being  
2 supported.

3 Over the last few years, we estimate that U.S.A.I.D. has invested  
4 about \$80 million a year in grants in providing support for legal and institution  
5 reform in developing countries.

6 Examples of USAID mission programs supporting the development  
7 of competition policy, law, and related institutions are perhaps the easiest to find  
8 in Eastern Europe and the former Soviet Union as, prior to the collapse of the  
9 Soviet Union, competition simply wasn't an issue. They didn't have it, so  
10 therefore there wasn't any law to deal with it.

11 These programs illustrate well, though, I think, how U.S.A.I.D.  
12 responds to local requests and the local situation with fairly complex sets of  
13 activities. Since I personally spent '95, '96, and most of '97 in Russia working on  
14 the program there, I would like to use an example from that country to illustrate  
15 how, in fact, we tried to provide support broadly to legal and institutional reform  
16 within the context of economic growth and the conversion of the economy from a  
17 state-owned, state-directed economy into a market economy, and specifically  
18 within that, some of the areas of competition policy, law, and institutional  
19 development that we supported.

20 The stated commitments of the governments of both Russia and  
21 Ukraine, (although I'm just going to just deal with Russia in the interests of time  
22 today) to convert their directed, state-owned economies into market economies  
23 led us and U.S.A.I.D. missions in these countries to develop a range of activities

1 that could establish the building blocks for a privately owned and managed  
2 market economy as quickly as possible.

3               So in Russia, for example, we supported the privatization and often  
4 the breakup of state-owned enterprises, the development of competitive private  
5 business and financial sectors, and the establishment of a rule of law essential  
6 for markets and private enterprises to function.

7               Competition policy or antimonopoly policy and its implementation  
8 were an important element of these programs. Our U.S.A.I.D. mission in Russia  
9 worked with a range of government institutions in a number of sectors to define  
10 areas where technical assistance, training, and sustained support could develop  
11 public sector entities that would regulate, rather than own and operate, the  
12 economy. The magnitude of this sort of change should not be underestimated.

13              Support to the Ministry of Economy and the Antimonopoly  
14 Committee resulted in the skills needed to draft and lobby for a Law on Natural  
15 Monopoly, which passed the Duma and became law in 1995. The major  
16 significance of this law was that it narrowed the range of legitimate state  
17 intervention in the regulation and control of prices over the enterprise sector of  
18 the economy for the very first time.

19              So as a result of that law, in the power distribution sector, it was  
20 considered to be okay to fix prices and control them; bakeries, no. Prior to that  
21 time, every single loaf of bread had a fixed price.

22              This work complemented and accelerated the completion of the  
23 privatization process for many industries which had previously been state

1 monopolies. Sometimes progress was made by preventing the enactment of laws.  
2 In 1995, for example, we funded a two-week seminar for policymakers and others  
3 which focused on a draft price control law which was then under control in the  
4 Duma. The seminar illuminated the costs of such anticompetitive action for  
5 specific parties and the economy. And the results of the workshop were so  
6 persuasive that the bill's authors did not go forward with the anticipated  
7 legislation: action through inaction.

8               U.S.A.I.D. also supported efforts in a program on natural  
9 monopolies carried out by IRIS, which is a think tank-consulting group at the  
10 University of Maryland, between 1995 and 1997 documented, quantified and  
11 analyzed the efficiencies and inefficiencies and the financial management  
12 misconduct in the railroad sector. This was communicated officially. We  
13 actually told the Russians this.

14               While U.S.A.I.D. did not provide major support to the government  
15 to implement these proposed reforms, this analysis had a substantial influence on  
16 efforts in 1996 and 1997 by First Deputy Prime Minister Boris Nemtsov in his  
17 role as head of the reform Commission on Competition. He set performance  
18 targets for and began restructuring of the railway sector based upon these  
19 analyses provided by IRIS.

20               Support to various organizations in the energy sector was launched  
21 in 1994. It began the painstaking process of moving that entire sector onto a  
22 market-based footing with competition rather than monopoly characterizing the  
23 generation and distribution subsectors. U.S.A.I.D. helped the Federal Energy

1 Commission to set up shop as independent regulatory authority with  
2 responsibility both for electric power and gas pipelines.

3 Long-term contracts with consulting firms, U.S. universities, short-  
4 term and long-term training mechanisms, partnership grants with the U.S. Energy  
5 Association, and other kinds of interventions, including that of our own technical  
6 personnel, were used to increase Russians' awareness of the options available to  
7 them in reforming the energy sector and, not coincidentally, to open it up to  
8 foreign investment.

9 Unlike the World Bank, we in fact can promote U.S. investment.  
10 We are a bilateral agency.

11 Initially, U.S.A.I.D. advisors contributed to drafting the federal  
12 commission's charter, regulations and procedures, and in 1996 and 1997 similar  
13 technical assistance and training was extended to several of the regional energy  
14 commissions which had ratemaking and regulatory access responsibility over the  
15 local energy's.

16 Reportedly, progress in institutionalization of the Federal Energy  
17 Commission and a number of the regional energy commissions has progressed to  
18 the point that, when the Primakov government at the end of December 1998,  
19 January 1999, attempted to abolish these agencies, it failed.

20 The plan was to turn their functions over to a communist-led  
21 Ministry of Antimonopoly Policy, certainly an oxymoron, and it failed. The  
22 effort failed in part because, with U.S.A.I.D. technical assistance, the Federal  
23 Energy Commission and regional commissions had established themselves as

1 credible regulators whose demise would have represented a real loss of that  
2 expertise and transparency to the economy.

3           I could go on with more examples from Ukraine, but again in the  
4 interests of time, I will not. But I do want to share with you an example from  
5 Sub-Saharan Africa, where we now have a research activity under way which is  
6 analyzing the appropriateness of western-style competition law for the economies  
7 of Sub-Saharan Africa. The region-wide study, which is at this point being  
8 carried out on a case study basis in Madagascar, Senegal, and Benin, attempts to  
9 assess empirically the relative importance of various anticompetitive features of  
10 each economy.

11           This will permit testing of the hypothesis that restrictive business  
12 practices adopted by private sector actors, which are the issues most often  
13 addressed by western-style antitrust laws, may actually be relatively  
14 inconsequential in Africa when they're compared to the barriers to entry and  
15 growth stemming from the lack of market-augmenting laws and institutions. The  
16 findings of this analysis should help to define priorities for U.S.A.I.D. assistance  
17 in supporting legal and institutional activities to enhance trade and investment  
18 opportunities in the region.

19           One might in fact generalize that U.S.A.I.D.'s competition policy  
20 work emerges from its general assistance strategies and programs, that it  
21 complements a variety of private sector development initiatives. And it tends to  
22 focus on legal and institutional changes to modernize, harmonize, standardize,  
23 and regularize competitive business environments in developing and transitional

1 countries.

2                   But I should also note that USAID responds to requests for support  
3 on a limited basis in what we call our “non-presence countries,” that is, the  
4 countries which are not yet considered to be developed, but in which we do not  
5 have a mission. In 1996, for example, the Department of Justice and the Federal  
6 Trade Commission approached us with a proposal to provide assistance to  
7 Argentina and Brazil. The DOJ and FTC presented a convincing case for support  
8 by arguing that competition policy assistance in these countries would have a  
9 demonstration effect, and would create pressure for smaller economies in the  
10 region to take steps toward bringing their policies into line with the Mercosur  
11 protocol.

12                   To accomplish this, we utilized something which some of you may  
13 be familiar with but others may not, called the 632A and 632B mechanisms.  
14 These mechanisms permit U.S.A.I.D. to enter into an interagency agreement with  
15 other U.S. Government agencies and departments and enable them to manage the  
16 technical assistance process, either with their own staff or with hired  
17 consultants.

18                   Both the Latin American and Eastern Europe-New Independent  
19 States Bureaus have frequently used such mechanisms with DOJ and the FTC to  
20 support technical assistance and training activities relating to competition  
21 policy, law, and institutional development.

22                   Just briefly, let me outline some examples of the impacts which  
23 we've had. I will not talk about Indonesia, where in fact we've had a long

1 program of support to competition policy, which until the financial crisis really  
2 set in, had been very hard sledding, I think you will agree, but where we have  
3 found a renewed interest in, in fact, installing competition policy and elaborating  
4 it in areas of the government action which had previously been.

5 But let me give an example from Nepal and another one from  
6 Morocco, just to show how U.S.A.I.D.'s commitment to this effort has been  
7 longstanding, and in fact our approach permits us to take a gradual approach to  
8 developing the kind of local expertise which we feel is fundamentally the basis  
9 for the government or the country itself being able to undertake, to articulate,  
10 and to regulate and to implement competition policy and competitive practices.

11 In Nepal, in the early 1990s, U.S.A.I.D. provided technical  
12 assistance and channeled support for a wide array of reform activities under  
13 something called the Economic Liberalization Project. There have already been  
14 several accomplishments in the area of competition policy, but they were  
15 implemented in a sequential fashion. A first step assisted the government to  
16 analyze the domestic airline industry and carry out its deregulation. And this has  
17 already increased competition sharply.

18 Follow-on activities helped the government to deregulate the  
19 petroleum industry and to eliminate fertilizer subsidies. A consumer protection  
20 law and a new streamlined business registration policy were the next targets.  
21 The latter reduced the time necessary to register a new business from as much as  
22 three years to a few days, and resulted in the substantial creation of small  
23 enterprises.

1                   Finally, U.S.A.I.D. support facilitated privatization of a number of  
2 firms as well as the design and finance of a next round of privatization which  
3 will include the national dairy company and some public utilities. So it's been a  
4 gradual process across sectors with sort of step-by-step progression to an  
5 increasing influence of competition in the economy.

6                   In Morocco the story is similar. We began in 1992 when the  
7 Ministry of Economic Incentives of the Government of Morocco requested our  
8 assistance for its initiative to draft, enact, and implement a competition law. A  
9 team from the Harvard Institute for International Development, funded by us,  
10 analyzed the legal and economic environment for competition policy, reviewed  
11 the existing draft statute, made recommendations for amendments, and outlined a  
12 strategy for the development of an implementation agency.

13                  The team also identified a number of existing public and private  
14 restraints on competition. Private restraints ranged from agreements to fix prices  
15 and share markets to tying sales and mergers to dominant inter-monopoly market  
16 positions. Public restraints included price regulations, licensing requirements,  
17 and provisions in a variety of peripheral laws, such as the labor code.

18                  In September 1995 a team from IRIS -- again, the University of  
19 Maryland -- had extensive discussions with counterparts in the same Ministry, on  
20 a draft law that reflected many of the earlier recommendations. After a one-day  
21 seminar in Rabat in November of 1995, it was determined to go ahead.

22                  This year, 1999, four years later, the government of Morocco  
23 finally enacted a law which will serve as the driving force for competition and

1 protection of the consumer. Development of the law involved all ministries,  
2 professional chambers, private sector representatives and universities. The  
3 orientation of this legislation complies with the government's commitment in  
4 international treaties and agreements, the free trade zone agreement with the EU,  
5 UNCTAD agreements on restrictive business practices, and the WTO agreements  
6 on transparency, competition, and nondiscrimination. We feel this is an  
7 important advance for that country.

8               To generalize, the impacts of assistance depends very much on the  
9 country's own initiatives and complementary actions. USAID can help to draft  
10 competition policy; we can't apply it. Our consultants can help to draft laws and  
11 promote discussion of them; they don't pass them.

12              Our technical assistance and training teams can help to develop the  
13 local human capacity, design organizational structures such as regulatory  
14 commissions, and even equip them with databases, communications equipment,  
15 and the like, and we do. But when the U.S.A.I.D.-funded teams go home, it is up  
16 to the local government to make the new structures work.

17              What are we looking at in the future of competition policy? As I  
18 said before, approximately a quarter of our missions right now are undertaking  
19 some activity in the area of promoting competition policy, and about half are  
20 doing broader legal and institutional reforms. As long as our commitment to  
21 achieving our strategic goal of promoting broad-based sustainable economic  
22 growth in developing and transitional countries remains firm, and we receive  
23 funds, it is likely that USAID will continue to include this kind of support in its

1 portfolio.

2           We are looking to develop more tools, such as tools that we've  
3 called "Investors' Roadmaps" and "Commercial Policy Tool Kits," which enable  
4 countries themselves to apply somewhat of a checklist principle to their own  
5 environments, undertake the analysis empirically themselves to determine where  
6 it is that there is restraint of trade, and where it is that increased competition  
7 would improve the situation.

8           We are also looking at coordination with others. Coordination  
9 with the Department of Justice and the Federal Trade Commission has already  
10 been mentioned. We also cooperate very closely with the State Department in  
11 terms of their legal reform program. We expect this to continue.

12           We also coordinate closely with multilateral organizations such as  
13 IBRD and FIAS in helping to prioritize, shape, and inform the agenda. USAID  
14 and FIAS, for example, jointly sponsor the development and application of this  
15 one tool that we've found very helpful in more than 20 countries, so far, called  
16 the "Investors' Roadmap," because application of this diagnostic tool has led to  
17 the adoption of several reforms which have already helped to reduce corruption  
18 and reduce anticompetitive behaviors.

19           Finally, as noted, the majority of our legal and institutional reform  
20 activities are undertaken with private sector or university contractors: IRIS; the  
21 Harvard Institute for International Development; a number of other individuals  
22 from other universities. These have been very, very loyal partners in this effort.

23           We are also looking to work increasingly with NGO's and PVO's

1 such as the International Development Law Institute, currently based in Rome,  
2 which trains developing country lawyers in competition policy.

3           Then, finally, we work with the regional development banks who  
4 have some interest in this area.

5           We are looking in the future to focusing a bit more on Africa,  
6 because Africa is currently undergoing a major political and economic transition,  
7 the outcome of which we feel will be very important to the future interests of the  
8 U.S. The Africa trade and investment policy program is a major component of  
9 USAID's implementation of President Clinton's Partnership for Economic Growth  
10 and Opportunity in Africa.

11           This program, like others, provides training, technical assistance,  
12 and consulting advice to countries in Africa. Funded in 1998 at an initial level of  
13 \$5 million, in 1999 and FY 2000 we plan to spend about \$30 million a year in  
14 support of this Africa trade and investment initiative. So within this pot of  
15 funding, there should be a substantial amount of resources available for African  
16 countries wishing to, in fact, increase their emphasis on competition policy, law,  
17 and institution building.

18           I could give a number of other examples of future program  
19 possibilities, but I think that in the interests of time, I will cut it short here. We  
20 plan to continue working with developing countries even when the U.S. is not  
21 perceived at this point as a very fair partner -- in large part because our  
22 competitiveness on the global marketplace is so much stronger than theirs.

23           We in U.S.A.I.D. don't believe that the infant industries argument

1 often cited -- that somehow "we should be protected against the U.S. predation  
2 until we grow up" -- is valid. We feel that open economies and positive trade and  
3 a focus on fairness and transparency will be to the advantage of all sides in the  
4 trade bargain.

5 But we also feel that it is important to make sure that the human  
6 capacity development, the institutional development, and just the understanding  
7 that goes into writing up laws that people really truly can implement is an  
8 important part of our mandate. And so we look forward to working with the  
9 Department of Justice, our colleagues in the World Bank and IMF, and to  
10 continuing this kind of work in the near future.

11 Thank you.

12 DR. STERN: Thank you very much for your very thorough  
13 response to our questions.

14 Are there any questions for this panel?

15 MR. RILL: Actually, yes. We're tasked, of course, to advise the  
16 Department of Justice, and anyone else who might want to listen to us, with  
17 regard to competition policy within the United States. I certainly think that the  
18 development of competition policy throughout the world is, personally, a very  
19 salutary effort that could be encouraged by the United States.

20 A couple of thoughts for both IMF and World Bank. One, the  
21 notion that the more free market countries are faring better in the Asian crisis  
22 than the more command and control economies. Can that be documented in some  
23 way and can we correlate free market to, broadly speaking, competition policy

1 and deregulation?

2                   And then the next question I would have is: In conditioning  
3 financial assistance to the development of competition policies, whether it be  
4 laws or not, what kind of assistance, what kind of review, do your organizations  
5 give to both the existence and implementation of competition policy?

6                   And then, third: What kind of coordination is there between your  
7 agencies and the competition authorities, and for our particular purposes, the  
8 Antitrust Division of the Department of Justice and the Federal Trade  
9 Commission? And you can answer that in 30 seconds.

10                  MR. KHEMANI: About documenting that free markets and  
11 competitive processes have led to better withstanding of economic crisis, I think  
12 one has to look at that in two levels. One is at the broad level, which is the  
13 economies that I've mentioned, Hong Kong, Singapore, and China-Taipei, as it is  
14 referred to to be politically correct. I think that there one can find that the  
15 stability of their currency relatively speaking, but also the entry and exit  
16 processes for their business firms. For example, The Economist carried an  
17 article based on a Brookings discussion paper, and I may add by one of my staff  
18 members, on what was called a "Flexible Tiger". It mentioned the fact that if you  
19 look at a three-year period in China-Taipei something like 40 percent of the firms  
20 did not exist three years earlier. So there was a fair amount of churning and  
21 there was a significant amount of productivity notwithstanding this churning in  
22 the number of firms.

23                  So I think those are some sort of the broad brush documents that

1 one could point to.

2               However, whenever in developing countries people question the  
3 merits of having competition, one needs to just simply point out the record of the  
4 performance of newly privatized state enterprises in terms of their productivity,  
5 in terms of their revenue generation, and so on. Or one has to point out the  
6 performance of newly deregulated sectors. So for example in a country like  
7 India, the deregulated automobile sector, the deregulated domestic airline sector,  
8 the deregulated airline sector of Nepal which was mentioned, clearly indicate  
9 lower prices, increased traffic volume, increased purchasing power of people.

10              So I don't think one needs to belabor that point too much. There  
11 are some sectoral-specific as well as broad-based economy pieces of evidence.

12              In terms of what kind of assistance, when the World Bank helps  
13 countries draft or strengthen competition laws and policies, we've had a variety  
14 of approaches. We've organized workshops and seminars where we relied on the  
15 staff from the U.S. Antitrust and Federal Trade Commission, from the Canadian  
16 Bureau of Competition, as well as from the competition bureaus of newly  
17 developed economies, those that have recently adopted competition law policies.

18              So when we organized training sessions in Vienna we made sure  
19 that we had officials from not only the Slovak and the Czech Republics and  
20 Poland, but also Russia, etcetera, participating and indicating the difficulties that  
21 they have been encountering in implementing competition law and policy.

22              But these are one-shot affairs. They are not -- they don't really  
23 build institutional capacity. What one needs is a bit more long-term advisors,

1 those who are either willing to take leaves of absence -- and I'm aware of Federal  
2 Trade Commission officials and Justice Department officials who have done that  
3 in the Czech, Slovak and Ukraine -- or to find retired executives who may be  
4 interested in spending six months to eight months in helping countries get their  
5 system up and running.

6               We certainly tap on a lot of the private law and economic  
7 consulting firms. But the transaction costs involved in all this are very, very  
8 high, and what I'm very keen to explore in the Bank is to see whether we could  
9 not create a multidonor trust fund so that we're not looking for funding each time  
10 we have a program in a particular country, but that we have this trust fund with  
11 an Advisory Committee drawn from the antitrust officials, agencies of the  
12 various contributors, and trying to enlist the staff in sort of short term  
13 assignments or getting private sector consultants using this trust fund so that one  
14 can have quick response and more sustainable assistance. This is something that  
15 we are still talking about.

16              Coordination. We coordinate a lot with the U.S., Canadian,  
17 Australian, and other antitrust authorities. However, one recommendation that I  
18 would like to make is that the OECD committee which deals with international  
19 cooperation makes it as a standing item of their proceedings on a quarterly basis  
20 of reports from the various member countries as to what technical assistance is  
21 being provided, for two reasons: to avoid duplication and to get greater  
22 coordination.

23              Now, Indonesia, curiously, is an interesting example, because in

1 Indonesia we had the Germans, we had the Australians, the Canadians, the U.S.,  
2 all providing assistance. Finally what the Indonesian authorities did was they  
3 asked the World Bank to be the coordinator of all technical assistance to  
4 Indonesia in the implementation of their new law. Their new law is not perfect,  
5 it's got lots of warts, but it at least is not as bad as the one that my colleague,  
6 Richard, was alluding to. That was about six or seven months ago we did manage  
7 to do some damage control there.

8                   But however, in implementation of that law what we've done is  
9 we've signed a formal agreement where the representatives of the various  
10 countries have said that they will coordinate all their technical assistance  
11 through the World Bank, so as to avoid duplication. Not that we want to be in the  
12 driver's seat. As I said, our resources are scarce as well.

13                   But it certainly avoids situations like in Russia, where five  
14 different countries were advising it initially on competition laws. They actually  
15 ended up with three securities law drafts from three different countries and  
16 jurisdictions. We want to avoid that wasteful duplication.

17                   MR. GORDON: I'll just add a couple things. With respect to proof  
18 as to the superiority of free and open markets, the entire Fund is premised on that  
19 view. In fact, if you look at the foundation of the building you'll find that those  
20 words are inscribed somewhere.

21                   MR. RILL: I wasn't asking about objectives. I was asking about  
22 realization.

23                   MR. GORDON: I think I would only add that probably pretty much

1 every publication that comes out of the Fund at least tries to make that argument  
2 and to support that with as much empirical evidence as they can. With respect to  
3 the effect of competition policies, that's another thing.

4 I might step back again and say that another difference between the  
5 Fund and the Bank is you guys have three buildings. I just want to point that out.

6 MR. KHEMANI: Nine.

7 MR. GORDON: In D.C.?

8 MR. KHEMANI: We have nine buildings.

9 MR. GORDON: Nine buildings. We have one, a much smaller  
10 staff.

11 But also the Fund often does deal in crisis situations. Perhaps it  
12 shouldn't, it should anticipate crises better than it does. And often it is very  
13 difficult, for example in Indonesia, where I had worked, for a flying mission to  
14 wind up in Jakarta and to say: Okay, what's wrong that needs to be fixed? We've  
15 got 24 hours: We have to have a list of prior actions before the Indonesian  
16 government is going to get money.

17 Now, you can imagine how impossible that is. Think of  
18 competition, not only in terms of competition policy in economies, but also  
19 competition among different objectives for achieving overall economic recovery.  
20 I was just jotting down a few. We used to think that the most important things  
21 were budget reform, then tax. I used to do tax technical assistance when I was  
22 teaching law before I joined the Fund.

23 Then banking supervision became the big thing because in Korea,

1 there was this terrible banking trouble. Then bankruptcy, because when you went  
2 to Indonesia it turned out it wasn't banks that were borrowing, but it was private  
3 companies. Then it turns out that all the private companies were in difficulty  
4 with respect to corporate governance and that became a major thing, and on and  
5 on and on.

6 I think in the Korean program there were a list of 96 -- I could be  
7 wrong -- prior actions having to do with passing laws and enacting new policies.  
8 It's going to be very, very difficult.

9 So when providing either policy advice or technical assistance,  
10 competition law is only one of many, many things that need to be done. Think of  
11 chaos theory, where one little change can result in enormous unintended  
12 consequences. This is one of the concerns that we had had in Indonesia, where  
13 very minor aspects of the draft competition law could have helped shut down  
14 competition, that perhaps the issue was not necessarily that what we needed was  
15 a competition law to break up the conglomerates. Perhaps the conglomerates  
16 were actually competing with each other very effectively. The principal problem  
17 with economic sclerosis was corporate governance, related party lending.

18 I'm not saying that was the conclusion, but these are issues that  
19 came up, with a very brief period of time to try to figure out what to do, which is  
20 an advantage of having the World Bank and U.S.A.I.D. and other bilateral  
21 donors, multilateral banks, who can probably have greater in-depth, prolonged  
22 examination of these issues and help sort out what the priorities are, because  
23 when you have limited resources, and I mean limited intellectual resources,

1 particularly on the part of governments, they have to know what do we need to do  
2 now and what's the most important of the things we need to do now if we're going  
3 to straighten out a particular crisis. And the Fund is more crisis-oriented.

4 MR. RILL: As Shyam has had a great deal of experience in this  
5 area, I've had some experience in the 1990, 1991 period with AID programs in  
6 Eastern and Central Europe. And we found that the two or three week visit was  
7 generally viewed by the Central and Eastern European authorities that we were  
8 sending people to visit as, while I think I'm overstating a little bit, tourist trips.  
9 And that to be useful, long-term, six, eight-month or longer assignments of U.S.  
10 Department of Justice and FTC personnel under AID funding were, to the  
11 contrary, quite useful.

12 I'm not familiar now with how many of those longer term programs  
13 using Department of Justice and FTC personnel are extant with USAID. So I  
14 wonder if you could tell me? Or at least supply that information if you don't have  
15 it off the top of your head.

16 MS. SIMMONS: I don't have it on the top of my head. We do have  
17 a number of agreements with the Department of Justice to provide those kinds of  
18 assistance. I'm not sure that in most cases we've overcome the short term  
19 consultant problem for the reason that my colleagues said, which is that DOJ  
20 people don't often want to spend the whole year.

21 MR. RILL: I didn't have a lot of trouble finding people --

22 MS. SIMMONS: Oh, really?

23 MR. RILL: -- who wanted to go to, well, Prague.

1 MS. SIMMONS: But we can find that, we can find that data out for  
2 you if you're interested in knowing how many there are right now.

3 MR. RILL: I'd like to know how many over the recent past, say the  
4 last two years, how many of these longer term, six month plus, programs are  
5 underway. And I'd also like to ask you now if you think those have been useful  
6 undertakings?

7 MS. SIMMONS: Oh, yes. As I was trying to say in my remarks, I  
8 think that the institution building side of U.S.A.I.D.'s program is the side that we  
9 provide that's somewhat unique compared to the World Bank and IMF. We are  
10 actually able to get a contract team or a university team to spend three years, five  
11 years, six years, doing a range of activities both providing actual product, such as  
12 laws, but also training and actually setting up and helping a new organization,  
13 such as the federal energy commission in Russia, to learn how to work.

14 MR. RILL: I was really asking -- you're going more broadly than I  
15 wanted. I was just asking the efficacy of the Department of Justice and FTC  
16 long-term training programs, whether there's been an evaluation and what are the  
17 results of those evaluations, because anecdotally I found from the heads of the  
18 agencies that I talked to that those were the programs in the area of competition  
19 policy that were particularly useful. And I'm wondering if they're continuing and  
20 whether you also find them -- currently and formerly -- to be useful?

21 MS. SIMMONS: I will check. I don't actually know right now.

22 MS. JANOW: It's sometimes said that the budget of the WTO is  
23 less than the travel budget of the World Bank.

1 MR. KHEMANI: Possibly.

2 MS. JANOW: And yet you have a lot of institution building,  
3 capacity building obligations embedded in WTO commitments, some of those of  
4 a legal nature, whether it's IPR enforcement, competition dimensions in telecom  
5 agreements, et cetera.

6 So my question to you is -- I think this idea you've raised, Shyam,  
7 of a trust fund for competition policy purposes is fascinating. Can we imagine a  
8 circumstance where the Bank and the Fund and U.S.A.I.D. is actually  
9 systematically collaborating in areas of shared objective, possibly when those  
10 overlap with objectives that we have in, say, the WTO? Can you imagine a  
11 meaningful ongoing collaborative scheme being designed? Is there a way of  
12 doing that? Should we be thinking along these lines or are the bureaucracies of  
13 that just pulling in too many different directions? Because it seems that there's  
14 an opportunity here for pulling these resources together, at least collaborating in  
15 the design or the implementation of capacity building exercises while retaining  
16 the autonomy of agency action.

17 Is there more scope for this or is this just an Advisory Committee's  
18 dream?

19 MR. RILL: Or Shyam's dream.

20 (Laughter.)

21 MR. KHEMANI: Can I give you an actual concrete example?

22 MS. JANOW: Yes.

23 MR. KHEMANI: We have a \$32 million trust fund -- we expect it

1 to grow to \$50 million in another year or so -- which deals only with  
2 privatization of infrastructure services. Now, this trust fund has been  
3 predominantly contributed to by the UK.

4                   And my -- and since I'm speaking in my personal capacity here, I  
5 think that there are two incentives that drive this. One is of course that  
6 ownership, state ownership or control of infrastructure facilities represents  
7 potentially a huge revenue source for addressing the deficits, not just the current  
8 deficits but the running deficits of many developing countries because they don't  
9 run these facilities on an efficient basis. But also, water, sanitation, power, are  
10 basic fundamental areas that are lacking in many developing countries. So I  
11 think that the trust fund is motivated by helping to alleviate poverty by  
12 increasing health standards through more effective water and sanitation facilities  
13 while giving electrification to villages and communicating and connecting them  
14 to the world.

15                   In tangent I could mention that the cocoa farmers in Cote d'Ivoire,  
16 once they got more effective market-driven telecommunication services, they  
17 were able to check what the stock market price of cocoa was in London without  
18 being cheated by the middlemen who previously used to deny them that  
19 information. So this is empowerment as we see it.

20                   On the other hand, I may also say that there's no doubt that the UK  
21 is a leader in terms of selling its privatization services, and so this trust fund  
22 could also pave the way for UK companies' access in providing advisory as well  
23 as engineering and other services in the countries where this type of regulatory

1 system is being put into place.

2                   So this is an actual example and it's developed on competition  
3 principles.

4                   MS. SIMMONS: Could I just perhaps remark that it's very unlikely  
5 the United States will put its bilateral assistance money into this trust fund.

6                   MS. JANOW: But can you imagine a collaborative effort on a  
7 case-by-case basis --

8                   MS. SIMMONS: Certainly --

9                   MS. JANOW: -- what are you doing in country X and how can we  
10 supplement that, or where are we in conflict?

11                  MS. SIMMONS: In virtually all countries in which the World  
12 Bank and U.S.A.I.D. work together, there is some mechanism for donor  
13 collaboration, often, as Shyam mentioned, under the leadership of the World  
14 Bank in something called a CG, or consultative group, in which there are regular  
15 meetings, regular exchanges of information.

16                  The success of these is somewhat based upon personality, but it  
17 also is based upon the fact that people realize that it's inefficient for everybody  
18 to go full-bore at the same problem from seven different directions. That's not to  
19 say that in all cases we agree, and that indeed there are not differences of opinion  
20 as to the appropriate way to proceed or not proceed.

21                  We in U.S.A.I.D. have spent a great deal of time on donor  
22 coordination, and I think most staff people would have a kind of mixed reaction  
23 that, yes, it's something that's essential to do, but no, it's not fun, because you

1 have your own institutional background, you have your own, in our case, our own  
2 government's perspective and our own government's policy, and it's difficult  
3 often to sort of make that same policy and that same perspective link with that of  
4 the UK or EU or whoever.

5               So I think it's important to be realistic about the level of  
6 collaboration that one can achieve, but I think it's also important to note that we  
7 all do it, that we totally agree with you that it makes sense to do, and that to the  
8 extent that we can actually program our money either in a trust fund joint activity  
9 or whether we do it in what we call parallel financing, where everybody sort of  
10 lines up their financing next to each other, we think that it's an important thing to  
11 do.

12               MS. JANOW: Thank you.

13               DR. STERN: Further questions?

14               MR. RILL: No, thanks.

15               DR. STERN: My question, just very briefly, is if you have any  
16 idea either within the Bank or U.S.A.I.D. how much funding resources are spent  
17 on developing antidumping laws versus competition policy laws? From my  
18 personal experience, I know quite a bit of work has been done in a number of  
19 different countries. We've been hearing, of course, about the proliferation of  
20 competition policy laws, but there's also a proliferation of antidumping laws. I  
21 wanted to know if you had any general statement or if you could provide  
22 something later that would document that differential.

23               MS. SIMMONS: I can look for some examples, but I can't

1 immediately cite anything regarding antidumping policy. The database that I  
2 have right now does not make a distinction between what sort of competition  
3 policy and general trade policies are being supported.

4 DR. STERN: Right.

5 MS. SIMMONS: -- the antidumping area.

6 DR. STERN: Right. Well, in fact one of my questions is whether  
7 the competition -- the breakouts for the resources for competition policy includes  
8 the work and training for new trade laws.

9 MS. SIMMONS: Yes, it does.

10 DR. STERN: So the data that we would get on competition policy  
11 would then be both in setting up something that would be dealing with mergers  
12 and cartel enforcement as well as the trade laws? It's agglomerated.

13 MS. SIMMONS: Yes.

14 MS. JANOW: Is it all legal development or is it trade,  
15 bankruptcy --

16 MS. SIMMONS: We've consulted with the missions who actually  
17 manage these programs and -- as I tried to emphasize, these are often fairly  
18 complicated programs -- and what folks are focusing on this six months may be  
19 quite different from what they're focusing on in the next six months. I'd actually  
20 have to talk with some of the people who are implementing those programs and  
21 try to figure out what the balance is. But I could do that if you're interested.

22 MS. JANOW: Could you take a stab at that? Based on what we  
23 were hearing from the Department of Justice staff on competition development,

1 could we get your reactions to our draft memo that we have shared with you?

2 MS. SIMMONS: Yes.

3 MS. JANOW: And I'm sure you can sort it out for us. It would be  
4 wonderful.

5 MS. SIMMONS: Yes.

6 MS. JANOW: Thank you.

7 MR. KHEMANI: Six and a half years ago when I joined the World  
8 Bank, I was shocked to learn that as one of the World Bank's conditionality to a  
9 loan in Venezuela said you should pass an antidumping law.

10 DR. STERN: Yes.

11 MR. KHEMANI: So I quickly met with the economist, who was a  
12 macroeconomist, and corrected his basic economics about competition. So I can  
13 say now with a great degree of confidence that since that time the Bank has not  
14 assisted any country in drafting an antidumping law, and we would not devote  
15 any resources towards that.

16 However, in a country like Jordan, for example, we did help them  
17 draft a safeguard law. And we certainly do not mind in assisting countries with  
18 respect to safeguard laws, because Jordan was suffering from transitory dumping  
19 or a transitory increase in supply -- one shouldn't use the term "dumping" in that  
20 context, but increase in supply -- of basic steel rods coming from the Ukraine,  
21 and it was disrupting their own market in that regard. So basically their  
22 producers, a few of them, were suffering a bit.

23 In any case, that's our position with respect to that particular area.

1                   Now, in terms of how much resources do we actually expend on  
2 competition law Bank-wide, I would have to canvas my colleagues, but I think I  
3 can say with also a fair degree of confidence that we spend less than, I would say,  
4 \$700, \$800,000 a year in providing technical assistance or some assistance to  
5 countries globally -- this is 184 member countries -- in the area of competition  
6 policy. Which is grossly inadequate.

7                   DR. STERN: I have another line that I'd like to pursue a little  
8 deeper: Merit's on coordination with the WTO. I suspect that much of the  
9 outcome of the debate between the U.S. and the EU on what the future role of the  
10 WTO shall be with regard to competition policy will yield a lot of pledges for  
11 greater education and the educational role of the WTO.

12                  And, as Merit pointed out, the WTO's resources are extraordinarily  
13 limited, which gets to the whole question of the coordination with the other  
14 Bretton Woods institutions, such as the World Bank and the IMF, in carrying out  
15 such a goal. You've talked about your limited resources. Do you anticipate that  
16 the World Bank and the IMF, either through pressure from the WTO Secretariat  
17 or pressure from the bigger countries like the U.S. and the EU, will start to  
18 develop a new budget that will work with the WTO on this "educational role" in  
19 competition policy?

20                  MR. KHEMANI: Well, first I'd like to point out that the WTO has  
21 had three symposiums on the interface between competition and trade policy.

22                  DR. STERN: Yes.

23                  MR. KHEMANI: All three have been cosponsored with the World

1 Bank, albeit on a very limited budget. For the future, I do not know, really. I do  
2 not have a good enough crystal ball in that regard. There's a lot of internal  
3 pressure, pressure generated by Joe Stiglitz and myself and others, that the Bank  
4 needs to do more in the area of competition policy. So certainly  
5 recommendations or views expressed by committees like yours will buttress that  
6 cause.

7 DR. STERN: Well, that's good to know.

8 MS. JANOW: I think we've made a contribution simply by  
9 introducing Ms. Simmons and Mr. Gordon and Khemani today.

10 DR. STERN: That's right.

11 Well, I don't hear any other questions for now and I hope that -- I  
12 have heard a lot of statements of pledges to cooperate after the hearing in trying  
13 to provide some more information on how to make this a more efficacious going-  
14 forward.

15 I can't help but to close this panel with my memories of going to  
16 the World Bank in the very early seventies with my husband, who had just  
17 published a book on the role of merchants in rural development in India, and was  
18 talking about this word that was called "privatization." And it was as if he had  
19 horns, because at that time -- it may be the fundamental tenet today of the World  
20 Bank, but at that time there was tremendous support for state-run cooperatives  
21 and other such statused activities.

22 MR. RILL: Antitrust was different in the seventies, too, Paula.

23 DR. STERN: So we have to remember that we have to keep on

1 keeping on. That sometimes the pendulum may swing back again. So we're  
2 hopeful that this work that we're doing today will have an impact, not only  
3 medium term, but in the long-term, in the event that the pendulum swings again.

4 MS. JANOW: Thank you very much.

5 DR. STERN: Any other questions? Gratuitous comments, besides  
6 mine?

7 Thank you very, very much for your time and your energy. Thank  
8 you.

9 This meeting is now adjourned.

10 (Whereupon, at 5:30 p.m., the meeting was adjourned.)

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